(25,011)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 300.

ED. CRANE, PLAINTIFF IN ERROR,

vs.

J. J. CAMPBELL, SHERIFF OF LATAH COUNTY, IDAHO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1916.

1 In the Supreme Court of the United States.

ED CRANE, Plaintiff in Error,
vs.
J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, and also in rendition of the judgment of a plea, which is in the said Supreme Court of the State of Idaho before you and all of the judges of the Supreme Court of said state, sitting en banc, at the January term, A. D. 1915 thereof, being the highest court of law or equity of said State of Idaho in which a decision could be had in said suit, between Ed Crane, petitioner therein, plaintiff in error herein, and J. J. Campbell, as Sheriff of Latah County, Idaho, defendant therein, and defendant in error herein, No. 2655, wherein was drawn in question the validity and constitutionality under the constitution of the United States of a law duly enacted and approved by the State of Idaho being Chapter 11 of the Laws of Idaho, 1915, ap-
2 proved February 18, 1915, entitled "An act defining prohibition Districts and Regulating and Prohibiting the Manufacture, Sale, Keeping for Sale, Transportation for Sale, or Gift and Traffic in Intoxicating Liquors, etc." and of an authority exercised thereunder, on the ground that said law is repugnant to, violative of, and contrary to the constitution of the United States, and the decision and judgment of said court was in favor of such their validity; or wherein was drawn in question the right, title, privilege or exemption specially set up or claimed by said plaintiff in error under Section 1 of the XIV Amendment to said constitution, and the decision and judgment of said Supreme Court of the State of Idaho was against the rights, privileges and immunities claimed by said plaintiff in error; a manifest error hath happened to the great damage of the said Ed Crane, as by his petition for writ of error and the order of court allowing the same appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in said Supreme Court at Washing-

ton within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief
3 Justice of the Supreme Court of the United States, this 25th day of October, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

Done in the City of Boise, and County of Ada, with the seal of the Circuit Court of the United States of America in and for the Southern District of the State of Idaho attached.

[Seal United States District Court, Idaho, 1890.]

W. D. McREYNOLDS,
Clerk of the District Court of the United States for the Southern District of Idaho.

Allowed by:
ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

Copy of the Within Writ of Error received and service of the same admitted at Moscow, Idaho, this 27th day of October, 1915.

FRANK L. MOORE,
Prosecuting Attorney of the County of Latah, State of Idaho, and Attorney for Defendant in Error, J. J. Campbell, as Sheriff of the County of Latah, and said State of Idaho.

[Endorsed:] In the Supreme Court of the State of Idaho. Ed Crane, Plaintiff in Error, vs. J. J. Campbell, as Sheriff of the County of Latah, State of Idaho, Defendant in Error. Writ of Error. Filed Oct. 29, 1915. I. W. Hart, clerk.

4 In Re Ed Crane.

Ed Crane, Petitioner,
vs.
J. J. Campbell, as Sheriff of Latah County, State of Idaho, Defendant.

Return to Writ of Error.

United States of America,
Supreme Court of Idaho, ss:

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the

complete record and proceedings in the within entitled case with all things concerning the same, in accordance with order for transcript filed on behalf of petitioner in said cause.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court at Boise, Idaho, this 13th day of November, 1915.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court of the State of Idaho.

5 *Amendment to the Local Option Law for Prohibition Territory.*

Senate Bill No. 50, by Privileges and Elections Committee—An Act Defining prohibition districts and regulating and prohibiting the manufacture, sale, keeping for sale, transportation for sale or gift, and traffic in intoxicating liquors and prohibiting drinking and drunkenness in public places in such prohibition districts, and fixing fines and penalties, and repealing Chapter 27 and Chapter 99 of the Session Laws of 1913.

Be It Enacted by the Legislature of the State of Idaho:

Section 1. A prohibition district within the meaning of this Act and all other acts regulating or prohibiting the traffic in intoxicating liquors shall be any county or incorporated city or village wherein the manufacture, sale, possession, keeping for sale, transportation for sale or gift of intoxicating liquors for beverage purposes is declared unlawful, whether such prohibition district be established by Constitutional amendment, legislative enactment, adoption of the provisions of the local option law or by refusal of municipal authorities or county commissioners to grant saloon licenses.

Section 2. It shall be unlawful for any person, firm, company or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district or to have in his or its possession or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided: Provided, That so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole, it shall not be unlawful for any person, company or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of a prohibition district: Provided, That nothing in this Act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol.

Section 3. Before a pharmacist shall be authorized to transport pure alcohol for scientific or mechanical purposes or for compound-

ing or preparing medicines, as provided by this Act, he shall procure a permit for that purpose from the Probate Court.

Section 4. To procure such permit, a pharmacist shall make and file with the Probate Court of the county where the pure alcohol is to be used, a statement in writing, under oath, stating that he desires to transport pure alcohol for scientific or mechanical purposes, or for compounding, preparing or preserving medicines only, as provided by this Act, and giving his name, the location of his place of business, a statement that he is a licensed pharmacist, that he is regularly engaged in the practice of his profession at the location named and that he will not violate any provision of this Act.

Section 5. If the Probate Court is satisfied of the good faith of the applicant, he shall issue to such pharmacist a permit to transport pure alcohol for compounding, preparing or preserving medicines, or for scientific or mechanical purposes. Such permit shall be substantially in the following form:

5½ *Permit to Pharmacist to Transport Pure Alcohol for Compounding, Preparing, and Preserving Medicines Only, or for Scientific or Mechanical Purposes.*

STATE OF IDAHO,
County of ——, *ss:*

—— ——, a pharmacist residing at ——, is hereby permitted to transport pure alcohol for compounding, preparing and preserving medicines only or for scientific or mechanical purposes. This permit can only be used for one shipment and will be void after twenty days from the date of issue.

By order of the Probate Court.

Dated this — day of ——, 19—.

—— ——,
Probate Judge.

Section 6. The said permit mentioned in Section Five hereof shall be issued upon forms supplied by the Probate Court and shall contain the permit, a copy of the application for permit and a copy of the provisions of Section Seven of this Act, and shall be issued under the seal of the Court and shall be void for transportation purposes after twenty days from the date of issuance. The Probate Court shall keep in a separate book provided for that purpose a record of permits issued under this Act, wherein shall be entered the date and the number thereof, the person to whom issued and the purpose for which issued.

Section 7. Said permit shall be attached to and remain affixed in a conspicuous place upon any package or parcel containing pure alcohol, imported into or shipped within the State of Idaho, and when so affixed, shall authorize any common carrier, or any person operating a boat or vehicle for the transportation of goods, wares or merchandise within the State of Idaho, to transport, ship or carry

such pure alcohol. Any person so transporting such alcohol shall, before the delivery of such package or parcel, cancel said permit and so deface the same that it cannot be used again.

Section 8. All express companies, railroad companies, public or private carriers, are hereby required to keep a separate book in which shall be entered, immediately upon receipt thereof, the name of the person to whom pure alcohol is shipped, from what city or town and state the same was shipped, and the name of the shipper, the amount and kind received, the date when received, the date when delivered and to whom delivered, after which record shall be a blank space in which the consignee shall be required to sign his own name in ink before such pure alcohol is delivered to such consignee, which book shall be open to the inspection of the public at any time during business hours of the company, and shall not be removed from the county wherein the same is required to be kept. A copy of entries upon any such record herein provided to be kept, when certified to by the agent of any express or railroad company, or any public or private carrier in charge of the same, shall constitute prima facie evidence of the facts therein stated in any court of this State.

It shall be unlawful for any person, firm or corporation, or agent to ship alcohol or intoxicating liquor to a false or fictitious name or person or any person to receive or receipt for alcohol or intoxicating liquor in a false or fictitious name.

Section 9. Any common carrier or any person operating a boat or vehicle for the transportation of goods, wares or merchandise may accept for transportation, and may transport to any such prohibition territory within the State of Idaho, shipments of wine for sacramental purposes, when there is attached to such shipments a certificate in substantially the following form:

"I, or we, certify that this package contains only — (amount) of —— wine, which has been ordered by —— ——, who represents himself to be a duly authorized and officiating priest, or minister of the — Church at ——, Idaho, and that said wine is desired for sacramental purposes only.

—— ——,"

Signature of Shipper.

6 Section 10. Whenever a shipment of wines for sacramental purposes shall have been transported for delivery within prohibition territory, the delivering agent of the transportation company must refuse to deliver the same unless it is accompanied by the certificate prescribed in Section 9 of this Act, and then only to the person to whom the same is addressed, or upon his written order. The transportation company must keep a record of all shipments and deliveries of wines for sacramental purposes, and must preserve for a period of one year after their receipt, all certificates accompanying such shipments, and all written orders upon which deliveries may be made. Such records must be open to the inspection of the public at any time during office hours.

Section 11. Any person who shall desire to purchase pure alcohol

for scientific or mechanical purposes shall apply to the Probate Court for a permit for that purpose. To procure such permit he shall make and file with the Probate Court of the county where the pure alcohol is to be used, a statement in writing, under oath, stating that he desires to purchase pure alcohol for scientific or mechanical purposes as provided by this Act and giving his name and residence and the place at which such pure alcohol is to be used.

Section 12. If the Probate Court is satisfied of the good faith of the applicant, he shall issue to said applicant a permit to purchase pure alcohol for scientific or mechanical purposes. The original of said permit shall have attached thereto a duplicate copy and each shall be numbered with the same number and be in substantially the following form:

STATE OF IDAHO,
County of ——, *ss:*

—— —— residing at ——, is hereby permitted to purchase pure alcohol in the amount — (here insert quantity) to be used for scientific or mechanical purposes. This permit can only be used for one purchase and the copy hereof attached hereto shall be conspicuously pasted upon the package containing said alcohol and this permit to purchase shall be void after twenty days from the date hereof.

By order of the Probate Court.
Dated this — day of ——, 19—.

—— ——,
Probate Judge.

Section 13. The permit mentioned in Section 12 shall authorize the applicant to purchase and any pharmacist to sell and deliver to him, the quantity named in the said permit. The permit shall be cancelled, kept and retained on file for at least one year by the pharmacist so selling said pure alcohol and the copy of said permit shall be, by the pharmacist, conspicuously pasted upon the receptacle containing said alcohol and shall so remain upon said receptacle so long as the same shall contain alcohol. Said permit and copy shall only authorize one purchase and sale. It shall be unlawful for any pharmacist to sell pure alcohol without the permit herein specified or for any person to keep or have in his possession any pure alcohol unless the receptacle containing the same shall be distinctly labeled with the copy of the permit authorizing the purchase of the same.

Section 14. It shall be unlawful for any person, owning, leasing or occupying or in possession or control of any premises, building, vehicle, car or boat to knowingly permit thereon or therein manufacture, transportation, disposal or the keeping of intoxicating liquor with intent to manufacture, transport, or dispose of the same, in violation of the provisions of this Act.

Section 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided.

Section 16. Any person who shall, in a prohibition district, in any public place or in or upon any passenger coach, street car, boat, or in or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform or waiting room, drink any intoxicating liquor of any kind, or any person who shall be drunk or intoxicated in any public or private road or
6½ street, or in any passenger coach, street car or any public place or building, or at any public gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, he shall be guilty of a misdemeanor.

Section 17. Whenever in this Act an offense is defined as a misdemeanor, the same shall be punishable under Section 6313 of the Revised Codes of Idaho.

Section 18. Any person convicted of violation of any of the provisions of this Act where the punishment therefor is not herein specifically provided, shall be punished by a fine of not less than Fifty ($50.00) dollars nor more than Five Hundred ($500.00) dollars, and by imprisonment in the county jail for not less than thirty days, nor more than six months.

Section 19. A person having once been convicted of a violation of any of the provisions of this Act, except Section 16, who thereafter violates the provisions hereof, shall be considered a persistent violator of this Act and shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the State penitentiary at hard labor for not less than one year and not more than two years.

Section 20. In case a pharmacist is convicted under the provisions of this Act, the court shall, in addition to the penalty provided by this Act, revoke his license to practice pharmacy.

Section 21. The issuance by the United States of an Internal Revenue Special Tax Stamp or Receipt to any person as a dealer in intoxicating liquors shall be prima facie evidence of the sale of intoxicating liquors by such person during the time the stamp or receipt is in force and effect.

A copy of such stamp or receipt or of the record of the issuance thereof, certified to by a United States Internal Revenue Officer having charge of such record is admissable as evidence in like case and with like effect as the original stamp or receipt.

Section 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this Act.

Section 23. The provisions of Chapter 15, Session Laws of 1911, are hereby specifically extended to and made applicable in the enforcement of this Act.

Section 24. Chapter 27, Session Laws of 1913, and Chapter 99, Session Laws of 1913, and all other acts and parts of acts in conflict herewith are hereby repealed.

Section 25. It is expressly declared that should any Section, part or portion of this Act be declared unconstitutional or void, such invalidity shall in no way affect the remaining portions of said Act.

Approved February 18, 1915.

7 In the Supreme Court of the State of Idaho.

In the Matter of the Application of ED CRANE for a Writ of Habeas Corpus.

Petition for Writ.

To the Supreme Court of the State of Idaho:

Now comes Ed Crane, the petitioner above named, and respectfully shows to the Court:

That he, the said Ed Crane, is unlawfully imprisoned, detained, confined and restrained of his liberty by J. J. Campbell, Sheriff of the County of Latah, State of Idaho.

That the said imprisonment, detention and confinement are illegal, and that the illegality thereof consists of this, namely, that on the 16th day of May, 1915, your petitioner was charged with having in his possession intoxicating liquors, and that thereafter on a preliminary examination therefor he was held to answer said charge, and was duly committed in default of bail to the custody of the Sheriff of the County of Latah, State of Idaho, and that thereafter an information was duly filed by the Prosecuting Attorney of Latah County, State of Idaho, charging your petitioner with the offense of having in his possession intoxicating liquors, a copy of which information together with an agreed statement of the facts pertaining to the case are hereto attached, marked "Exhibit A" and "Exhibit B" and made a part of this petition.

Your petitioner contends that the provisions of Sections 2, 15 and 22 of Chapter 11 of the Session Laws of 1915 of the State of Idaho are unconstitutional and void in this, that the said sections re-
8 ferred to are in contravention of the Fourteenth Amendment to the Constitution of the United States and also of Section 13, Article 1 of the Constitution of the State of Idaho, and that the provisions of said sections *is* not a reasonable exercise of the police power of the state, and is for that reason void.

ED CRANE,
Petitioner.

J. A. FORNEY,
A. H. OVERSMITH,
Attorneys for Petitioner.

STATE OF IDAHO,
County of Latah, ss:

Ed Crane, being first duly sworn, says that he is the petitioner above named, that he has read the foreging petition and knows the contents thereof, and that the same is true of his own knowledge as he verily believes.

ED CRANE.

Subscribed and sworn to before me this 1st day of June, A. D., 1915.

[SEAL] A. H. OVERSMITH,
Notary Public.

Endorsed: Filed June 3, 1915. I. W. Hart, Clerk, by E. S. David, Deputy.

9 In the Supreme Court of the State of Idaho.

In Re ED CRANE.

Agreed Statement of Facts on Application for Writ of Habeas Corpus.

Now comes J. H. Forney and A. H. Oversmith, attorneys for Ed Crane, the petitioner herein, and Frank L. Moore, the Prosecuting Attorney of Latah County, State of Idaho, and stipulate and agree as follows:

First. That the said Frank L. Moore is now, and was at all the times herein mentioned, the duly elected, qualified and acting Prosecuting Attorney of Latah County, State of Idaho.

Second. That J. J. Campbell is now, and was at all the times herein mentioned, the duly elected, qualified and acting Sheriff of Latah County, State of Idaho.

Third. That the said Ed Crane is now, and was at all the times hereinafter mentioned, a resident of the County of Latah, State of Idaho.

Fourth. That on the 16th day of May, 1915, the said Ed Crane had in his possession a bottle of whiskey for his own use and benefit, and not for the purpose of giving away or selling the same to any person.

Fifth. That thereafter a complaint was duly filed by the said Prosecuting Attorney charging the said Ed Crane with the crime of having whiskey in his possession, and that thereafter on a preliminary examination therefor, the said Ed Crane was duly committed to the custody of the Sheriff of the said Latah County, State of Idaho, in default o fbond, and now is confined in the county jail of said County of Latah, State of Idaho, and that said
10 commitment and confinement was solely and only because he had violated Sections 2, 15 and 22 of Chapter 11 of the 13th Session Laws of the State of Idaho, approved February 18, 1915.

Sixth. That Latah County, is now, and was at all the times herein mentioned, a Prohibition District within the meaning of the act referred to, Chapter 11 of the Session Laws of 1915 of the State of Idaho.

Seventh. That the bottle of whiskey referred to was not obtained and possessed under any permit authorized by the said act.

Eighth. That thereafter an Information was duly filed by the

said Prosecuting Attorney charging the said Ed Crane with the offense aforesaid, a copy of which said Information is hereto attached, marked "Exhibit A" and made a part hereof.

Ninth. It is further stipulated that the production of the body of the said Ed Crane at the hearing before the Supreme Court is hereby waived, and that the merits of said cause may be heard on the application for said writ.

Tenth. Counsel of petitioner contend that the provisions of Sections 2, 15 and 22, Chapter 11 of the act referred to are in contravention of the Fourteenth Amendment to the Constitution of the United States, and also of Section 13, Article 1 of the Constitution of the State of Idaho, and that said provision is not a reasonable exercise of the police power of the state, and is for that reason void.

FRANK L. MOORE,
Prosecuting Attorney for Latah County, State of Idaho.
A. H. OVERSMITH,
J. H. FORNEY,
Attorneys for Petitioner.

Endorsed; filed June 3, 1915 I. W. Hart, Clerk. By E. S. David, deputy.

11 "EXHIBIT A."

In the District Court of the Second Judicial District of the State of Idaho, in and for Latah County.

STATE OF IDAHO, Plaintiff,
vs.
ED CRANE, Defendant.

Information.

Comes now Frank L. Moore, the duly elected, qualified and acting Prosecuting Attorney in and for Latah County, State of Idaho, and informs the court as follows:

That the defendant, Ed. Crane, prior to the filing of this information and on the 18th day of May, A. D. 1915, upon a preliminary examination on the charge of "Having in his Possession Intoxicating Liquor in a Prohibition District of the State of Idaho," held in the Probate Court of Latah County, State of Idaho, before Will F. Morgareidge, the duly elected, qualified and acting Probate Judge of Latah County, State of Idaho, sitting as a Committing Magistrate, was thereupon by said Committing Magistrate then and there held to answer said charge in the above entitled court.

Wherefore, I, Frank L. Moore, Prosecuting Attorney of Latah County, State of Idaho, by this information do accuse the said defendant, Ed Crane, of a crime against the State of Idaho, to-wit: a Misdemeanor, namely: Having in his possession intoxicating

liquor in a Prohibition District of the State of Idaho, committed as follows, to-wit:

That in Latah County, State of Idaho, and on or about the 16th day of May, A. D. 1915, the said defendant, Ed Crane, then
12 and there being, did then and there in a prohibition district or the State of Idaho, to-wit: Latah County, Idaho, wilfully, knowingly and unlawfully have in his possession intoxicating liquor, to-wit: whiskey, contrary to the form, force and effect of the statutes in such case made and provided, and against the peace and dignity of the State of Idaho.

FRANK L. MOORE,
Prosecuting Attorney for Latah County, State of Idaho.

STATE OF IDAHO,
County of Latah, ss:

Frank L. Moore, being first duly sworn, on oath deposes and says that he is the Prosecuting Attorney of the County of Latah, State of Idaho; that he has read the foregoing information, and knows the contents thereof, and that the same is true as he verily believes.

FRANK L. MOORE.

Subscribed and sworn to before me this 19 day of May, A. D. 1915.

HOMMER E. ESTES, *Clerk.*
By ADRIAN NELSON,
Deputy Clerk.

Names of Witnesses Known to the Prosecuting Attorney at the Time of Filing This Information.

1. Grant Robbins.
2. J. W. McCusker.
3. Mae Campbell.

13 Endorsed on back: Case No. 493. In the District Court of the Second Judicial District of the State of Idaho in and for the County of Latah. State of Idaho, Plaintiff, vs. Ed Crane, Defendant. Information. Filed this 19 day of May 1915, at 2 o'clock P. M. Homer E. Estes, Clerk of the District Court, by Adrian Nelson, Deputy Clerk. Frank L. Moore, Prosecuting Attorney, Latah County, Idaho.

14 In the Supreme Court of the State of Idaho.

The State of Idaho to J. J. Campbell, Sheriff of Latah County, Greeting:

We command you, That you have the body of Ed Crane by you imprisoned and detained, as is averred in the petition of said Ed

Crane on file in this court, before this court at the court room thereof, in the city of Boise on the 19th day of June, 1915, at 10 o'clock A. M. of that day, to do and receive what shall then and there be considered concerning the said Ed Crane.

Witness: Hon. Isaac N. Sullivan, Chief Justice, of the Supreme Court of the State of Idaho, this 3d day of June, 1915.

[SEAL.] I. W. HART, *Clerk.*

15 In the Supreme Court of the State of Idaho.

In re ED CRANE.

Return of Sheriff on Writ.

STATE OF IDAHO,
County of Latah, ss:

Now comes J. J. Campbell, Sheriff of the County of Latah, State of Idaho, and in response to the Writ of Habeas Corpus hereto annexed, makes his return as follows:

That he is the duly qualified and acting Sheriff of the County of Latah, State of Idaho. That the said Ed Crane is now detained, confined and restrained of his liberty for the following reasons, and none other:

That on the 16th day of May, 1915, the said Ed Crane was duly charged with having in his possession intoxicating liquor, and that thereafter on a preliminary examination therefor he was held to answer said charge, and in default of bail was duly committed to the Sheriff of the County of Latah, State of Idaho, and that thereafter an Information was duly filed by the Prosecuting Attorney of Latah County, State of Idaho, charging the said Ed Crane with the offense of having in his possession intoxication liquor, a copy of which Information is hereto annexed, marked "Exhibit A" and made a part of this return.

That Frank L. Moore is the Prosecuting Attoenry of the County of Latah, State of Idaho, who represents the state in the above entitled proceedings, and that J. H. Forney and A. H. Oversmith are attorneys for the said Ed Crane.

That a stipulation as to the facts herein has been duly
16 entered into, a copy of which is hereto annexed and made a part of this return, and that the presence of the said Ed Crane before the Supreme Court has been duly waived, and the presence of the said J. J. Campbell, Sheriff of the County of Latah, State of Idaho, has also been duly waived before the Supreme Court, and that the said J. J. Campbell, Sheriff as aforesaid, is now ready to make any additional answer the court may require.

J. J. CAMPBELL,
Sheriff Latah County, State of Idaho.

Endorsed: Filed June 19, 1915. I. W. Hart, Clerk.

17 In the Supreme Court of the State of Idaho.

In re ED CRANE.

Stipulation.

Now comes J. H. Forney and A. H. Oversmith, attorneys for Ed Crane, the petitioner for writ of habeas corpus in the above entitled proceeding, and Frank L. Moore, the Prosecuting Attorney of Latah County, State of Idaho, and stipulate and agree as follows:

That the presence of the said Ed Crane before the Supreme Court of the State of Idaho at Boise on the 19th day of June, 1915, on the hearing of the application for Writ of Habeas Corpus be, and the same is, hereby waived, and that the presence of the said J. J. Campbell, Sheriff of the County of Latah, State of Idaho, on the said hearing is hereby waived, and that the said Ed Crane is now held in the custody of the Sheriff of the County of Latah, State of Idaho, in default of bail for the sole and only reason that he is charged by virtue of an Information charging him with having in his possession a bottle of whiskey on the 16th day of May, 1915, and on a preliminary examination was duly committed to the custody of the Sheriff of the County of Latah, State of Idaho, because he had violated sections 2, 15 and 22 of Chapter 11 of the 13th Session Laws of the State of Idaho, approved February 18, 1915.

J. H. FORNEY,
A. H. OVERSMITH,
Attorneys for Petitioner.
FRANK L. MOORE,
Prosecuting Attorney for Latah County, State of Idaho.

Endorsed: Filed June 19, 1915. I. W. Hart, Clerk.

18 (Copy of Information omitted as copy is attached to petition for Writ of Habeas Corpus.)

19 In the Supreme Court of the State of Idaho, January Term.

Filed Sept. 11, 1915. I. W. Hart, Clerk.

In Re Application of ED CRANE for Writ of Habeas Corpus.

Chapter 11, Session Laws, 1915, Constitutional—Intoxicating Liquors—Law Prohibiting Manufacture, Transportation, Sale, Possession—Sufficiency of Title—Local and Special Law—Possession and Use of Pure Alcohol for all Scientific and Mechanical Purposes; Wine for Sacramental Use—Prohibition Districts Defined—When Act Effective.

1. Chapter 11, Session Laws, 1915, providing, among other things, that it shall be unlawful for any person, firm, company or corpora-

tion, its officers or agents to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district, or to have in his or its possession, or to transport any intoxicating liquor or alcohol within a prohibition district, unless the same shall have been procured and is so possessed and transported under a permit as in said act provided, is not in contravention of section 1 of the fourteenth amendment to the constitution of the United States, nor of section 13, article 1 of the constitution of Idaho. It was passed by the legislature with a view to the protection of the public
20 health, public morals and public safety, and has a real and substantial relation to those objects; and is, therefore, a reasonable exercise of the police power of the state.

2. The object of the title of an act is to give a general statement of the subject-matter, and such a general statement will be sufficient to include all provisions of the act having a reasonable connection with the subject-matter mentioned and a reasonable tendency to accomplish its purpose. It is sufficient if the act treats of but one general subject and that subject is expressed in the title.

3. Held, that Chapter 11, Session Laws, 1915, is not in conflict with article 3, section 16 of the constitution, and is not, therefore, unconstitutional or void.

4. Said chapter is of general application to every county in the state alike; and with the electors of the respective counties of their boards of county commissioners, or municipal authorities of any incorporated city or village is left the decision to accept or reject its terms and conditions. It is, therefore, neither a local nor a special act, but a general law and not in conflict with section 19, article 3 of the constitution.

5. The chapter expressly provides for the purchase and possession of pure alcohol to be used for scientific purposes. Held, that the practice of medicine, surgery, dentistry and dental surgery are sciences, and that pure alcohol may be lawfully procured under the terms of the law in question in the manner provided therein for use in the practice of these professions or for any other scientific purposes.

6. A prohibition district within the meaning of Chapter 11, Session Laws, 1915, is any county or incorporated city or village wherein the manufacture, sale, possession, keeping for sale, transporta-
21 tion for sale or gift of intoxicating liquors for beverage purposes is declared unlawful, whether such prohibition district be established by constitutional amendment, legislative enactment, adoption of the provisions of the local option law or by refusal of municipal authorities or county commissioners to grant saloon licenses.

7. Held, that the provisions of the chapter are effective in all such prohibition districts within the state, whether created before or after its adoption.

Application for writ of habeas corpus. Writ quashed.

J. H. Forney, A. H. Oversmith, for Petitioner.

Frank L. Moore, Prosecuting Attorney, for State.

J. H. Peterson, Attorney General.
E. G. Davis, Ass't " "
T. C. Coffin, " " "
Herbert Wing " " "
Harry Kessler,
Herman H. Taylor,
Cleve Groome,
Amici Curiæ.

22 PER CURIAM:—

The petitioner, Ed Crane, was arrested upon the charge of having intoxicating liquor in his possession in Latah county and upon preliminary examination had before a magistrate was held to answer said charge in the district court and in default of bail was committed to the custody of the sheriff. This proceeding was commenced by filing a petition for a writ of habeas corpus to procure his release from custody.

The agreed facts necessary to a determination of the questions of law here presented are that on the 16th day of May, 1915, the petitioner had in his possession in Latah county, a quantity of whiskey for his own use and not for the purpose of selling it or giving it away; that Latah county now is and on May 16th, 1915, was a prohibition district within the meaning of Secs. 2, 15 and 22 of chap. 11 (p. 41) Sess. Laws, 1915, which sections are as follows:

"Sec. 2. It shall be unlawful for any person, firm, company, or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district or to have in his or its possession or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided: Provided, That so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole, it shall not be unlawful for any person, company, or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transporta-
23 tion to and sale outside of a prohibition district: Provided, That nothing in this Act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol."

"Sec. 15. It shall be unlawful for any person, to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this Act."

The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scien-

tific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whiskey, or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited.

One of the contentions made upon behalf of petitioner is that the sections quoted are in contravention of Sec. 1 of the 14th amendment to the constitution of the United States, and also of Sec. 13, Art. 1 of the constitution of Idaho and that the act in question is not a reasonable exercise of the police power of the state and is void. Sec. 1 of the 14th amendment to the constitution of the United States is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States
24 and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 13 of Art. 1 of the constitution of Idaho provides, among other things: "No person shall * * * be deprived of life, liberty or property without due process of law."

No fixed rule has been discovered by which to determine whether or not a statute of the nature of the one under consideration is a proper exercise of the police power, but it may be said the questions propounded to the courts are: Does the statute purport to have been enacted to protect the public health, the public morals, or the public safety? Has it a real and substantial relation to those objects, or is it, upon the other hand, a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation address themselves to the legislative, not to the judicial branch of the government.

In the case of Territory of Washington v. Ah Lim, 9 L. R. A. 395, Mr. Justice Dunbar, quoting from Williams v. Cammack, 27 Miss. 209, said: "The legislative power 'may be unwisely exercised or abused, yet it is a power entrusted by the Constitution to the Legislature, which, while exercised within the scope of the grant, is subject alone to their discretion; with which the judicial tribunals have no right to interfere because, in their judgment, the action of the Legislature is contrary to the principles of natural justice.'" See also State v. Lewis, 20 L. R. A. 52; New York ex rel Silz v. Hesterberg, 211 Sup. Ct. Rep. 29, 53 L. ed. 75.

25 Mr. Justice Hughes in delivering the opinion of the supreme court of the United States in case of Purity Extract & Tonic Company v. Lynch, 226 U. S. Sup. Ct. Rep. 192; 57 L. ed. 184, said: "That the state, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. * * * It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective.

It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. * * * With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legisative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system."

Mr. Justice Harlan delivering the opinion of the court in case of Mugler v. Kansas, 123 U. S. Sup. Ct. Rep. 623, 31 L ed. 205, said:

"It is, however, contended, that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, 'no convention or Legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage,
26 any article of food or drink not endangering or affecting the rights of others.' The argument made in support of the first branch of this proposition, briefly stated, is that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among these rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

"It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in Munn v. Illinois, 94 U. S. 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.'

27 "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power

is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U. S. 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in Marbury v. Madison, 5 U. S., 1 Cranch, 137, 167, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited
28 and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

"Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing
purposs, to be necessary to the peace and security of society,
29 the courts cannot without usurping legislative functions, override the will of the people as thus expressed by their chosen

representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general and sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

"This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 31, that the Fourteenth Amendment has no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoilation of property, and secured equal protection to all under like circumstances, in respect as well as to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.' "

An examination of the opinion expressing a contrary view will disclose more of argument against the wisdom of such legislation as this than of reason why the aid of the courts may be invoked to defeat it.

The court of criminal appeals of Oklahoma in Ex parte Wilson, 119 Pac. 596, deciding that an act of the legislature making it unlawful for any person to have or keep in excess of one quart of in-

toxicating liquor is unconstitutional, quotes from a number of decisions wherein statutes similar in some respects to the act here under consideration have been held to be void, because not a reasonable exercise of the police power and in conflict with sec. 1 of the 14th amendment of the constitution of the United States and with
31 constitutional provisions similar to our sec. 13, art. 1. Quoting with approval from Commonwealth v. Campbell, 133 Ky. 50; 117 S. W. 383, 24 L. R. A. (N. S.), 172, 19 Am. & Eng. Ann. Cas. 159, it says:

"It will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because, of necessity, no one can drink that which he has not in his possession. So that if it is competent for the legislative body of any given city or district, or even the Legislature of the State, to prohibit the citizen from having liquor in his own possession, then a new and more complete way has been discovered for the establishment of total prohibition, not only in any precinct, town, or county, but throughout the State, because, if it is competent to prohibit the citizen from having liquor in his possession, it necessarily follows that he can neither sell nor use it, as it is a physical impossibility to do either without first having had the possession of the interdicted liquor."

The same opinion contains the following quotation from the case of State v. Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847:

"The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public; and, therefore, the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgement of the privileges and immunities of the citizen without any legal justification, and therefore void." See also State v. Williams, 146 N. C. 618; 61 S. E. 61; 17 L. R. A. (N. S.), 299.

32 Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that if the possession of such liquor "can by no possibility injure or affect the health, morals or safety of the public," the sale is equally harmless for it only transfers the possession from one person to another. The fact is, that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate and since "it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because, of necessity, no one can drink that which he has not in his possession," and since great difficulty has been encountered in enforcing the prohibitory laws the statement made by the learned jurist in the case of Mugler v. Kansas, supra,

relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage, might well be said with respect to its possession, which would make it read:

"And so, if, in the judgment of the legislature, the possession of intoxicating liquors would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question."

33 We have reached the conclusion that this act is not in contravention of sec. 1 of the 14th amendment to the Constitution of the United States, nor of Sec. 13, Art. 1, of the Constitution of Idaho; that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects and that it is, therefore, a reasonable exercise of the police power of the state.

It is next contended that there are subjects contained in the act under consideration which are not expressed in the title. Therefore, such portions of the act which are not expressed in the title are unconstitutional and void under art. 3, sec. 16, of the constitution. Said section provides that "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expresed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

The title of the act is as follows: "Defining prohibition districts and regulating and prohibiting the manufacture, sale, keeping for sale, transportation for sale or gift, and traffic in intoxicating liquors and prohibiting drinking and drunkenness in public places in such prohibition districts, and fixing fines and penalties, and repealing Chapter 27 and Chapter 99 of the Session Laws of 1913."

The objection urged to the sufficiency of the title is based upon the omission in the title of any reference to that portion of the act which prohibits "any person, firm or corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose, except the same shall have been obtained and is so possessed under a permit authorized by this act;"

34 also the failure of the title to refer to that portion of the act which provides that "The issuance by the United States of an Internal Revenue Special Tax Stamp or Receipt to any person as a dealer in intoxicating liquors shall be prima facie evidence of the sale of intoxicating liquors by such person during the time the stamp or receipt is in force and effect.

"A copy of such Stamp or Receipt or of the record of the issuance thereof, certified to by a United States Internal Revenue officer having charge of such record is admissible as evidence in like case and with like effect as the original Stamp or Receipt."

Necessarily the title of an act must be brief. The object of the title is to give a general statement of the subject-matter, and such

a general statement will be sufficient to include all provisions of the act having a reasonable connection with the subject-matter mentioned and a reasonable tendency to accomplish the purpose of the act. The object of the title is not to state the reason for the passage of the act, or to give an index to its contents, but to give a general statement of the subject-matter of the act. (Tarantina v. L. & N. R. R. Co. 254 Ill. 624.) As was stated in case of State v. Pioneer Nurseries Co., 26 Ida. 332, and other cases therein cited, "the title * * * is sufficient if the act treats of but one general subject and that subject is expressed in the title."

The act under consideration treats of but one general subject, namely, to limit the use of intoxicating liquors. There is nothing contained in the act that is not germane to the general subject or purpose expressed in the title. (Pioneer Irr. Dist. v. Bradley,
35 8 Ida. 310; Montclair Tp. v. Ramsdell, 107 U. S. 147, 27 L. Ed. 431, 2 Sup. Ct. Rep. 391.)

In People v. Parks, 58 Cal. 624, it is said: "Provisions of an act may be numerous; but however numerous, if they can be, by fair intendment, considered as falling within the subject-matter of legislation, or necessary as ends and means to the attainment of the subject, the act will not conflict with the Constitution." Each and every part of the act in question comes within the subject-matter of legislation, and is necessary as ends and means to the attainment of the object—to protect the health, morals, and promote the general welfare of the citizens of the state by the suppression of the unrestricted use of intoxicating liquors.

The object or purpose of the clause in the constitution above quoted is to prevent, as has been frequently stated in the opinions of this court, the combining of incongrous matters and objects totally distinct, and having no connection nor relation with each other; to guard against "logrolling" legislation; and to prevent the perpetration of fraud upon the members of the legislature or the citizens of the state, in the enactment of laws. The history of the various sessions of the legislature of this state in dealing with the liquor question, and leading up to the passage of the act in question, conclusively precludes the idea that there was any fraud connected with the enactment of the statute under consideration. The unanimity of the legislature in the passage of the act under consideration is sufficient evidence of the fact that they acted with full knowledge of the contents of the bill, and understood the consequences of their act in so far as they were concerned.

36 It is a well-established rule that where there is a doubt whether the subject of the act is sufficiently expressed in its title, the doubt should be resolved in favor of the validity of the act. Even though we were in doubt as to the sufficiency of the title under consideration, we are admonished, in case of State v. Pioneer Nurseries Co., supra, to resolve that doubt in favor of the validity of the act. There is, however, no doubt in our minds as to the sufficiency of the title.

It is next insisted that the act in question is local and special; therefore, in conflict with sec. 19, art. 3 of the constitution which

provides that "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For the punishment of crimes and misdemeanors. * * *"

It is contended by some of the many friends of the court who appeared as counsel in this case that the statute is local and special legislation, for the reason that it makes an act a crime in prohibition territory which is not a crime in wet territory; and, therefore, said statute is not a declaration of a state policy, but is applicable only to counties that have adopted the local option law. However, it will be observed that the statute is applicable to every county in the state alike.

It is true that the act under discussion may have local application, but it is nevertheless a general law, as it applies to all of the counties in the state alike whenever the electors of any county or the county commissioners thereof, or the municipal authorities of any incorporated city or village conclude to avail themselves of its provisions.

37 In Collier et al. Sumter County Commissioners v. Cassady et al., 57 So. Rep. 617, it was said that a law is a general law which is potentially applicable to every county in the state, though at the time of its passage it applies to but some of the counties.

In Clark v. Finlay, 54 S. W. 343, 345, the rule was enunciated that a local statute is one which relates to a particular person or particular thing of a class. And in State v. California Min. Co., 15 Nev. 234, it was said that a special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality.

In People v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793, it was said: "Whether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, 'not because they operate upon every person in the State for they do not, but because every person, who is brought within the relations and circumstances provided for, is affected by the laws.' Nor is it necessary, in order to make a statute general, that 'it should be equally applicable to all parts of the State. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.'"

This court in case of Mix v. Board of County Commissioners, 18 Ida. 706 announced the following doctrine: "The local option law is of general application to every county in the state. While it is left with the people of each county to say whether it shall be enforced in the county, that fact does not make it any the less

38 a general law * * * under its terms and provisions the electors of each county have a right to vote upon the question whether the sale or disposal of intoxicating liquors as a beverage shall be prohibited in such county. Every county in the state may accept or reject it upon the same terms and conditions. It is clearly a 'general law' within the meaning of that phrase as defined by the leading law-writers, and the courts of last resort of the nation * * *."

It has been argued that this law prohibits the use of alcohol by physicians and surgeons in the practice of their professions; that it

is unnecessarily stringent and is, therefore, not a proper police regulation. The act expressly provides for the purchase and possession of pure alcohol to be used for scientific purposes. While it is not contended in this case that petitioner had possession of the liquor for scientific purposes and while the liquor was not alcohol, but whiskey, so that this question may properly have no bearing upon the decision of this case, however, in order to set the minds of the citizens of the state forever at rest upon this point we will say that the practice of medicine, surgery, dentistry and dental surgery are sciences and that pure alcohol may be lawfully procured under the terms of this act in the manner provided therein for use in the practice of these professions, or by any person, citizen or hospital for any scientific or medicinal purpose. Webster defines the word medicine, used in the sense of the practice of medicine, as follows: "The science and art of dealing with the prevention, cure, or alleviation of disease."

Quoting from the case of United States v. Mass. Gen'l Hospital, 100 Fed. 932, 938; 7 Words & Phrases Judicially Defined, 39 6350, refers to the word "science" as applied to surgery as follows: "In the use of the word 'science', it cannot be denied that practical surgery is ordinarily thus spoken of. Webster's Dictionary describes surgery as a 'branch of medical science.'"

Since the act provides for the possession of pure alcohol to be used for scientific purposes, those who procure it in conformity to the provisions of the law in order to legitimately make use of it for any scientific purpose will not thereby have violated the law.

It has also been argued that this act cannot become effective in local option districts other than those created since its adoption. We have reached a conclusion to the contrary. Section 1 expresses the legislative intent upon this point as follows:

"Sec. 1. A prohibition district within the meaning of this Act and all other acts regulating or prohibiting the traffic in intoxicating liquors shall be any county or incorporated city or village wherein the manufacture, sale, possession, keeping for sale, transportation for sale or gift of intoxicating liquors for beverage purposes is declared unlawful, whether such prohibition district be established by constitutional amendment, legislative enactment, adoption of the provisions of the local option law or by refusal of municipal authorities or county commissioners to grant saloon licenses."

A number of counties of Idaho became prohibition districts at a time prior to the enactment of the law under consideration, pursuant to the provisions of an act of the legislature approved February 20th, 1909, Sess. Laws, 1909, page 9, which is our original local 40 option law, and which provides that counties may by vote determine whether or not the sale or disposal of intoxicating liquors as a beverage shall be prohibited.

It is quite possible that in some of these counties, at least, had that question been submitted to them the electors would have voted to reject the provisions of chapter 11 of the Session Laws, 1915, which make the mere possession of such liquors, in and of itself a crime. We have reached the conclusion that it is unnecessary to submit the

question of the adoption or rejection of the provisions of this law to the electors of prohibition districts created prior to its adoption.

It is said by Mr. Justice McCord in the case of Fitch v. State, 58 Tex. Crim. Rep. 366, wherein is digested a large number of decisions upon this subject: "If an element should invade local option territory opposed to the enforcement of local option laws and should throw its force against the will of the people and by its craft and cunning devise schemes and means to defeat the purpose of the law and invent a method whereby, through the forms of law, they should evade the crime that had been defined by the Legislature, it would be a monstrous doctrine to hold that the Legislature is powerless to enact legislation defining offenses and prescribing penalties for the new conditions that may arise because the same was not an offense at the time that local option was adopted." Further, quoting from the case of Dupree v. State, 102 Tex. 455, he said: "The purpose of the prohibition is to prevent the thing prohibited, * * *. Prevention of crime is one of the objects to which the most anxious thoughts and the most constant efforts of thoughtful legislators are directed, and the dealing with the steps preparatory to commission is a
41 favorite method. Our Code are full of instances of this, too numerous and too familiar to need citation." Continuing the opinion in the Fitch case it is said: "We, therefore, hold that the Act of the Thirty-first Legislature making it a penitentiary offense to engage in the business or occupation of selling intoxicating liquors in local option territory is a valid law; that the same applies to territory that had previous to the enacting of said law adopted local option and that the adoption of local option laws by the people does not withdraw that territory from legislative control to pass all needful legislation to make the local option laws effective, and to see that the will of the people is carried out."

While this court holds that the act under consideration is applicable to all prohibition districts within the state of Idaho whether they became such before or since its adoption, were it otherwise the argument in favor of restricting its application to those districts of later origin would not avail the petitioner. This court takes judicial notice that the county of Latah is a prohibition district by reason of the refusal of its board of county commissioners to grant liquor licenses and that no local option election has ever been held therein. Since the enactment of the law here under consideration no liquor license has been granted in that county, and it is, therefore, a prohibition district in contemplation of chapter 11 of the Sess. Laws, 1915, made and continued such by its board of county commissioners since the enactment of that chapter. Counsel for the petitioner and the prosecuting attorney have stipulated, upon this point, as follows: "That Latah County is now, and was at all times herein mentioned, a Prohibition District within the meaning of the act referred to, Chapter 11 of the Session Laws of 1915 of the State of Idaho."
42 By the provisions of chapter 28, Sess. Laws, 1915, the entire state of Idaho is constituted a prohibition district and said chapter is made effective on and after January 1, 1916, upon and after which date the provisions of chapter 11, Sess. Laws 1915, will

apply to the state at large; in the meantime it is effective in all prohibition districts within the state, whether created before or after its adoption and whether created by constitutional amendment, legislative enactment, adoption of the provisions of the local option law or by the refusal of municipal authorities or county commissioners to grant saloon licenses.

The writ of habeas corpus is quashed, and the petitioner is remanded to the custody of the sheriff.

43 In the Supreme Court of the State of Idaho.

In re Application of ED CRANE for Writ of Habeas Corpus.

This cause having been heretofore heard, submitted and taken under advisement by the Court, and the Court having fully considered the same, now on this day the cause was again called, and the decision of the Court is delivered Per Curiam, to the effect that the Writ of Habeas Corpus be quashed.

It is therefore considered, adjudged and decreed by the Court, that the Writ be quashed and the petitioner remanded to the custody of the sheriff.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original judgment entered in the above entitled cause, on the 11th day of September, 1915, and now of record in my office.

Witness my hand and seal of the Court this 11th day of September, 1915.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk*,

By —— ——,

Deputy Clerk.

44 In the Supreme Court of the State of Idaho.

In re ED CRANE.

ED CRANE, Petitioner,

vs.

J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant.

Order and Decree.

Be it remembered, that on the 3rd day of June, 1915, the petitioner presented to the judges of this court, as authorized by law, his petition for a writ of habeas corpus, and that thereupon said judges made an order requiring J. J. Campbell, as Sheriff of the

County of Latah, State of Idaho, defendant, to be and appear before the Supreme Court of the State of Idaho on the 19th day of June, 1915, said court having original jurisdiction thereof, under the Constitution of the State of Idaho, and being the highest court in said state to which said question could be presented and decided, and show cause why said Writ of Habeas Corpus should not issue, and that said application on said order, be heard on said last mentioned date on the merits thereof, on briefs to be filed by petitioner and defendant and on the argument of counsel, and that thereafter, to-wit: on the said 19th day of June, 1915, the said cause came on for final hearing before this court, J. H. Forney and A. H. Oversmith, appearing as counsel for petitioner, and Frank L. Moore, Prosecuting Attorney for Latah County, as counsel for J. J.
45 Campbell, the defendant, upon the petition of the petitioner heretofore filed, and the defendant, J. J. Campbell having duly filed his answer to said Writ, also attaching thereto a stipulation of facts by the respective parties hereto, and the respective counsel having made their arguments and presented and filed their briefs, and the following counsel as amicus curiæ having also argued said cause and filed their briefs, J. H. Peterson, Attorney General, E. G. Davis, Assistant Attorney General, T. C. Coffin, Assistant Attorney General, Herbert Wing, Assistant Attorney General, Harry Kessler, Herman H. Taylor, and Cleve Groome, Amici Curiæ, the Chief Justice, and the two associate justices being present, the said cause was submitted to the court and taken under advisement.

Now on this the 25th day of October, 1915, the Court having carefully considered the argument of counsel and the briefs heretofore filed and presented, finds that Chapter 11 of the Session Laws of Idaho, 1915, is not in conflict with, nor repugnant to Section 1 of the XIV amendment to the Constitution of the United States, nor of Section 13, Article 1 of the Constitution of Idaho, in accordance with the written opinion of the court filed with the clerk hereof, and that the petitioner's application for a Writ of Habeas Corpus should be denied.

Wherefore, it is ordered, adjudged, and decreed by the court that the petitioner's application for a Writ of Habeas Corpus be, and the same is, hereby denied, and that petitioner's application therefor, be, and the same is, hereby dismissed on its merits, and that the said petitioner, Ed Crane, be remanded to the custody of the Sheriff of Latah County, State of Idaho.

46 ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

Copy of this Order and Decree received and service of the same acknowledged this — day of ——, 1915.

——— ———,
Prosecuting Attorney of Latah County, State of Idaho, and Attorney to J. J. Campbell, Sheriff of the County of Latah, State of Idaho.

Endorsed: Filed Oct. 25, 1915. I. W. Hart, Clerk.

47 In the Supreme Court of the State of Idaho.

ED CRANE, Plaintiff,
vs.
J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant.

Notice.

To J. J. Campbell, as Sheriff of the County of Latah, State of Idaho, and Frank L. Moore, Prosecuting Attorney of Latah County, State of Idaho, his attorney:—

You are hereby notified that the petitioner in the above entitled cause will apply to the Supreme Court of Idaho, for a Writ of Error to the Supreme Court of the United States, in the above entitled cause, and for an order allowing the same and for a transcript of record, on the 25th day of October, A. D. 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard. A copy of said petition for writ of error being hereto attached.

J. H. FOMEY,
A. H. OVERSMITH,
Attorneys for Petitioner.

48 In the Supreme Court of the State of Idaho.

ED CRANE, Petitioner,
vs.
J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant.

Petition for Writ of Error.

Now comes the above named Ed Crane, petitioner, and says:

That on the 11th day of Sept., A. D. 1915, judgment was rendered in this cause and in this court, being the highest court in the State of Idaho, to which this cause could be presented, and which judgment then and there became final; that said Ed Crane was and is aggrieved in that in said decision and judgment of said court, certain errors were committed by the said court, to the prejudice of said Ed Crane, and that said Ed Crane in said cause presented and claimed that he was being prosecuted under a statute of the State of Idaho, to-wit: Sections 2, 15, and 22, Chapter 11, Session Laws of 1915, which was repugnant to and violative of Section 1 of the XIV Amendment to the Constitution of the United States, in that said law abridged the privileges and immunities of citizens of the

49 United States, deprived persons of property without due process of law, and denied to persons within the boundaries of the State of Idaho, the equal protection of the laws, and especially so that of the said Ed Crane, in each of the respects herein mentioned; and by the prosecution of the said Ed Crane under the

aforesaid statute of the State of Idaho, there was directly drawn in question and presented to the court the question whether said laws of the State of Idaho were in violation of, contrary or repugnant to the aforesaid Section 1 of the XIV Amendment to the Federal Constitution, and that by the decision and judgment of this court, this court refused to sustain said Ed Crane's contention and claim and refused to give the said Ed Crane the protection guaranteed to him by Section 1 of said XIV Amendment, and as he believes contrary to the constitution of the United States, all of which will more fully appear in detail from the assignment of errors herewith presented and filed herein.

Wherefore, said Ed Crane prays for an order allowing him, the said Ed Crane, to prosecute a Writ of Error to the honorable the Supreme Court of the United States under and according to the laws of the United States, in their behalf made and provided, and also that an order be made fixing the amount of security which the said Ed Crane shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said Writ of Error by the United States Supreme Court.

The said Ed Crane therefore prays that a duly authenticated transcript of the record and proceedings and papers herein may be sent to the United States Supreme Court.

J. H. FORNEY,
A. H. OVERSMITH,
Attorneys for Petitioner.

50 Due service by copy of the foregoing notice and petition for Writ of Error received and service of same admitted at Moscow this the 21st day of October, 1915.

FRANK L. MOORE,
Prosecuting Attorney for Latah County, State of Idaho, and Attorney for Defendant.

50½ [Endorsed:] In the Supreme Court of the State of Idaho. Ed Crane, Petitioner, vs. J. J. Campbell, as Sheriff of Latah County, State of Idaho, Defendant. Notice and Petition for Writ of Error. Filed Oct. 25, 1915. I. W. Hart, Clerk.

51 In the Supreme Court of the State of Idaho.

In re ED CRANE.

ED CRANE, Petitioner,
vs.
J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant.

Assignment of Errors.

Now comes the petitioner in the above entitled cause Ed Crane, and makes and files the following assignment of errors, in which

said Ed Crane claims the said Supreme Court of the State of Idaho erred to his grievous injury and wrong and to the prejudice and against the rights of the said Ed Crane in the following particulars, to-wit:

1. That the Supreme Court of Idaho erred in holding that Sections 2, 15, and 22, Chapter 11, Session Laws of 1915, of the State of Idaho, and approved by the governor February 18, 1915, was not repugnant or contrary to Section 1 of the XIV Amendment to the Constitution of the United States.

2. That said court erred in holding that said law of the State of Idaho did not abridge the privileges and immunities of citizens of the United States, and especially that of said Ed Crane.

3. That said court erred in holding that the aforesaid law of the State of Idaho did not deprive the said Ed Crane of property without due process of law.

52 4. That the said court erred in holding that said law did not deny to any person within the jurisdiction of the State of Idaho the equal protection of the law, and especially that of the said Ed Crane.

Wherefore, for this and other manifest errors appearing in the record the said Ed Crane, petitioner in the Supreme Court of Idaho, and plaintiff in error in the Supreme Court of the United States, prays that the judgment of said Supreme Court of Idaho be reversed and set aside and held for naught and that judgment be rendered for said Ed Crane, the plaintiff in error, granting him his rights under the Constitution of the United States, and said plaintiff in error also prays judgment for his costs.

J. H. FORNEY,
A. H. OVERSMITH,
Attorneys for Petitioner and Plaintiff in Error.

Endorsed: Filed Oct. 25, 1915. I. W. Hart, Clerk.

53 In the Supreme Court of the State of Idaho.

In re ED CRANE.

ED CRANE, Petitioner,
vs.
J. J. CAMPBELL, as Sheriff of the County of Latah, State of Idaho, Defendant.

Order Allowing Writ of Error.

Now comes Ed Crane, the petitioner above named, on this 25th day of October, 1915, and files and presents to this court his petition, praying for the allowance of a Writ of Error intended to be urged by him; and prays further that a duly authenticated transcript of the record proceedings and papers upon which the decision and judgment herein was rendered may be sent to the Supreme Court of the United States; and said Ed Crane having presented therewith an

assignment of errors, and praying that such other and further proceedings may be had in the premises as may be just and proper, and on consideration of said petition together with said assignment of errors, upon motion of J. H. Forney, it is ordered by this court that a Writ of Error be, and is hereby, allowed, as prayed for, to have reviewed in the Supreme Court of the United States the decision and judgment heretofore entered herein.

54 It is further ordered that the said Ed Crane be required to give bond according to law, in the sum of Five Hundred Dollars, which said bond shall operate as a supersedeas bond suspending and staying all further proceedings in this court until the determination of said Writ of Error by the Supreme Court of the United States.

Done and dated in open court this 25th day of October, A. D. 1915.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

Endorsed: Filed Oct. 25, 1915. I. W. Hart, Clerk.

55 In the Supreme Court of the State of Idaho.

In re ED CRANE.

ED CRANE, Petitioner,
vs.
J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant.

Bond.

Know all men by these presents that we, Ed Crane of the County of Latah, State of Idaho, as principal, and United States Fidelity & Guarantee Company of Maryland, a corporation duly authorized by the laws of Idaho to transact business within the said state of Idaho, as surety, are held and firmly bound unto J. J. Campbell, as Sheriff of Latah County, State of Idaho, defendant and defendant in error, in the sum of Five Hundred and no/100 Dollars, to be paid to him, and for the payment of which, well and truly to be paid, we bind ourselves and each of us, our, and each of our heirs, executors, administrators, successors, representatives and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of October, A. D. 1915.

Whereas, the above named Ed Crane has sued out a writ of error to the Supreme Court of the United States to reverse the
56 judgment rendered in the above entitled cause by the Supreme Court of the State of Idaho.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to

effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] UNITED STATES FIDELITY & GUARANTEE COMPANY,
By FRED NEAHT,
By J. H. FORNEY, *Attorney in Fact.*

The foregoing bond is duly approved.

ISAAC N. SULLIVAN,
Chief Justice;

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Endorsed: Filed Oct. 25, 1915. I. W. Hart, Clerk.

57 In the Supreme Court of the State of Idaho.

ED CRANE, Petitioner,
vs.
J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. J. Campbell, as Sheriff of Latah County, Idaho:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States of America at Washington, D. C., within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the clerk of the Supreme Court of the State of Idaho, wherein Ed Crane is designated in cause *cause* as petitioner, and is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, as chief justice of the Supreme Court of the State of Idaho, this 25 day of October, A. D. 1915.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

58 Service of the within Citation and receipt of a copy thereof admitted this 27th day of October, A. D. 1915.

FRANK L. MOORE,
Prosecuting Attorney for Latah County, State of Idaho, and Attorney for Defendant in Error Herein, and Defendant in Lower Court.

58½ [Endorsed:] No. 2655. In the Supreme Court of the State of Idaho. Ed Crane, Petitioner, vs. J. J. Campbell, as Sheriff of Latah County, State of Idaho, Defendant. Citation. Filed on return Oct. 29, 1915.

59 In the Supreme Court of the State of Idaho.

In re ED CRANE.

ED CRANE, Petitioner,
vs.
J. J. CAMPRELL, as Sheriff of Latah County, State of Idaho, Defendant.

Order.

On motion of petitioner, through his counsel, J. H. Forney, and A. H. Oversmith,

It is ordered that the Clerk of this court prepare a full, true, and complete transcript of all matters and things done and had in this Court, so that the said transcript may contain each and everything which was presented or was before this court on the hearing of said cause; and said clerk is ordered to include in said transcript a copy of Chapter 11 Session Laws, 1915, and approved February 18, 1915, also the opinion of the court, rendered and filed herein on the 11th day of September, 1915, together with a copy of the Petition for Writ of Habeas Corpus, Agreed Statement of Facts, Order of Court of June 3, 1915, Answer and Return of Sheriff to order of Court, Judgment, Order and Decree, Notice, Peti-
60 tion for Writ of Error, Order allowing Writ of Error, Bond, Writ of Error, Citation, and this order, together with Clerk's certificate to the transcript.

Dated this 25th day of October, A. D. 1915.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

61 In the Supreme Court of the State of Idaho.

In re ED CRANE.

ED CRANE, Petitioner,
vs.
J. J. CAMPBELL, as Sheriff of Latah County, State of Idaho, Defendant.

Clerk's Certificate to Transcript.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify the foregoing pages, numbered from 1 to 60

inclusive, to be a full, true, and correct transcript of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the Clerk of said Court, together with the original Writ of Error, the original Citation, copies of Chapter 11 of the Laws of Idaho, 1915, the Petition for Writ of Habeas Corpus, Agreed Statement of Facts, Order of court of June 3, 1915, Answer and return of sheriff to order of court, Decision of Court, Judgment, Order and Decree, original Notice and Petition for Writ of Error, copies of Assignment of Errors, Order allowing Writ of Error, Bond, and Order to Clerk, together with Clerk's Certificate to the Transcript

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Boise in said state, this 13th day of November, A. D. 1915.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Endorsed on cover: File No. 25,011. Idaho Supreme Court. Term No. 300. Ed Crane, plaintiff in error, vs. J. J. Campbell, sheriff of Latah County, Idaho. Filed November 29th, 1915. File No. 25,011.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1916.
No. [redacted]53

ED. CRANE,
Plaintiff in Error,
vs.
J. J. CAMPBELL, Sheriff, Latah County, Idaho,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR PLAINTIFF IN ERROR

J. H. FORNEY,
Counsel for Plaintiff in Error.

A. H. OVERSMITH of Counsel.

INDEX.

TABLE OF CASES.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1916
No. 300

ED. CRANE, Plaintiff in Error,
vs.
J. J. CAMPBELL, Sheriff, Latah County, Idaho, Defendant in Error.

BRIEF OF PLAINTIFF

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

STATEMENT OF THE CASE.

This case involves the validity of three sections of the statutes of the State of Idaho, and found in Chapter 11, Page 41 of the Thirteenth Session Laws of the State, and approved February 8th, 1915. (Transcript, page 3.)

The particular sections of such prohibitory law are as follows:

Sec. 2. "It shall be unlawful for any person, firm, company, or corporation, its officers or agents, to sell, manu-

facture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district *or have in his or its possion* or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided: PROVIDED, That so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole, it shall not be unlawful for any person, company or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of the prohibition district; PROVIDED, That nothing in this Act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol."

Sec. 15. "It shall be unlawful for any person, to import, ship, sell, transport, deliver, receive *or have in his possesion any intoxicating liquors except as in this Act provided.*"

Sec. 22. "It shall be unlawful for any person, firm, company, corporation or agent to have in his *or its possession any intoxicating liquors of any kind for any use or purpose* except the same shall have been obtained and is so possessed under a permit authorized by this Act."

The Plaintiff in Error, Ed. Crane, was arrested upon the charge of having intoxicating liquor in his possession in Latah County, Idaho. Upon a preliminary examination before a magistrate he was duly held to answer said charge and in default of bail was committed to the custody of the Sheriff of Latah County, State of Idaho, the defendant in error herein. He applied to the Supreme Court of the State for a writ of habeas corpus on the ground, among others, that the sections hereintofore set down are repugnant to the first section of the Fourteenth Amendment of the Constitution of the United States. (Transcript, page 8,

folio 8.) The facts adduced upon his preliminary examination and agreed upon by the respective parties hereto are found in the transcript, page 9, folio 9.

Special reference is hereby made to the fourth subdivision, namely:

"Fourth: On the 16th day of May, 1915, the said Ed. Crane had in his possession a bottle of whiskey for his own use and benefit and not for the purpose of giving away or selling the same to any person."

The court filed a written opinion (Ttranscript, page 15, Folio 22) holding that the statute was not repugnant to the Fourteenth Amendment and entered a final judgment dismissing the application for the writ and remanded the plaintiff in error to the custody of the sheriff, the defendant in error. (Transcript, page 26, Folio 44). The Chief Justice of said Court duly allowed the writ of error from this court.) Transcript, page 30, folio 53.) The case is reported as "In re Crane" (27 Idaho 671; 151 Pac. 1006).

Whiskey and beer are absolutely prohibited by the act referred to. The Supreme Court on this point found as follows:

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicines, so that the possession of whiskey, or of any intoxicatng liquor, other than wine and pure alcohol for the uses above mentioned is prohibited." (Transcript, page 15).

ASSIGNMENT OF ERROR.

The Supreme Court of Idaho ed in holding that the statute is not repugnant to the Fourteenth Amendment to the Constitution of the United States. The error is duly assigned in the assignment of error and in the parts of the writ of error filed in the State Court. (Page 29, Folio 51); (Page 28, Folio 48).

ARGUMENT.

It will be observed, *in limine*, that these provisions have no reference whatever to the intent or purpose for which the intoxicating liquor is in possession of a party, but they denounce as a crime the simple fact that the intoxicating liquor is in the possession of a person, however innocent the act or commendable the purpose. Has the Legislature of the State of Idaho consistently with the due process clause of the Fourteenth Amendment, the constitutional power to make such an act a crime?

The Fourteenth Amendment to the Constitution of the United States declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." And the same amendment makes all persons born or naturalized in the United States citizens thereof. It is conceded that the "privileges and immunities" here protected are such only as are in their nature fundamental; such as belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states of the Union, from the time of their becoming free, independent, and sovereign. What these fundamental rights are, it is not easy to enumerate; the courts preferring not to describe and define them in a general

classification, but to decide each case as it may arise. The following, however, have been held to be embraced among them: Protection by the government; the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject to such restraints as the government may justly prescribe for the general good of the whole." Washington, J., in Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3, 230; Connor v. Elliott, 18 How. 591 (15 L Ed. 497); in re Parrott (C. C.) 6 Sawy. 349, 1 Fed. 481; 6 Myer, Fed. Dec. No. 1000; Landing Co. v. Slaughter House Co., 111 U. S. 746, 4 Sup. Ct. 652 (28 L. Ed. 585). These are inalienable and indefeasible rights which no man, or set of men, by even the largest majority, can take from the citizens. They are absolute and inherent in the people, and all free governments must recognize and respect them. Therefore, it is incumbent upon the courts to give to the constitutional provisions which guarantee them a liberal construction, and to hold inoperative and void all statutes which attempt to destroy or interfere with them. Cooley, Const. Lim. (35) 44. It can hardly be questioned that the right to possess property is one of these rights, and that that right embraces the privilege of a citizen to keep in his possession property for another. It is not denied that the keeping of property which is injurious to the lives, health, or comfort of all persons may be prohibited under the police power.

The maxim, "Six utere tuo ut alienum non laedas," being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. But it does not

follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the state; and much less is such the case when the statute is merely claimed by its defenders to be intended for that purpose.

Blackstone in his Commentaries on the Laws of England, Book 1, page 123, says:

> "Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effect to society; and therefore it is then the business of human laws to correct them. Here the circumstances of publication is what alters the nature of the case. Public sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction."

> "Cooley, in his work on Constitutional Limitations, thus states the rule with reference to sumptuary laws, and the right of the Legislature to enact them: 'In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The rights of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our laws.' Pages 549, 550."

The Court in the case of Vance vs. Vandercook, 170 U. S. 468, had under consideration, the constitutionality of the dispen-

sary law of South Carolina, then in force. In that case, the Court said:

> "In the inception, it is necessary to bear in mind, a few elementary propositions, which are so entirely concluded by the previous adjudications of this Court, that they need only to be briefly recapitulated.
>
> (a) Beyond dispute, the respective States have plenary power, to *regulate the sale* of intoxicating liquors within their borders, and the scope and extent of such regulations, depend, solely, on the judgment of the law-making power of the States, *provided always, they do not transcend the limits of State authority, by invading rights, which are secured by the Constitution of the United States* and provided further, that the regulations as adopted, do not operate a discrimination against the rights of residents or citizens, of other States of the Union." (Italics added).

II

The courts of Kentucky do not base the right of the citizen to possess liquor for individual use on any particular provision of the constitution, so much as upon the broad ground that it is not a function of government in a free people to prohibit the citizen the right of owning or drinking liquor. In Adams Express Co. vs. Commonwealth, 154 Ky. at 471, the court, after citing Calhoun vs. Commonwealth, 154 Ky. 70 and Martin vs. Commonwealth, 153 Ky. 784, quoted the following language from Commonwealth vs. Campbell, 133 Ky. 50:

> "The history of our state from its beginning shows that there was never even the claim of a right on the part of the legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; and we are of opinion that it never has been within the compe-

tency of the legislature to so restrict the liberty of a citizen, and certainly not since the adoption of the present constitution. The Bill of Rights which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freeman exists nowhere in a republic, and not even in the largest majority, would be but an empty sound if the legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. * * * Therefore, the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty, the exercise of which will not directly injure society."

The same rule is laid down in State vs. Williams, 146 N. C. 618, 61 S. E. 61; Eidge vs. Bessemer, 164 Ala. 599, 51 Sou. 246 and State vs. Gilman, 33 W. Va. 146. In the case last cited the opinion at page 151 states:

> "Upon the whole case, it seems to me plain, that that part of said statute which inhibits a person 'to keep in his possession, for another, spirituous liquors,' etc., is in conflict with both the federal and state constitutions, and therefore void."

In Commonwealth vs. Smith, 163 Ky. 227, these principles are reaffirmed by the Court of Appeals, holding unconstitutional a part of an act of the legislature, approved March 9, 1914, entitled "An Act prohibiting the shipment of liquors for sale in local option territory and prohibiting persons from having in possession for sale liquors in such territory." The decision of the

court as shown by the second syllabus was that:

"Section 4——providing that prohibited territory, it shall be unlawful for any person to 'keep, store or possess any such liquors in any room, building, or structure other than the private residence of such person,' was unconstitutional was exceeding the authority of the legislature by prohibiting the possession of liquors for an innocent purpose with which the police power of the state is not concerned."

The court, after referring to previous decisions of its own, quotes the following from Freund on Police Power, sections 453, 454:

"Even the advocates of prohibition conceded that the State has no concern with the private use of liquor. The opponents of prohibition mistake the case by saying that the State has no right to declare what a man shall eat or drink. The State does not venture to make any such declaration. * * * It is not the private appetite or home customs of the citizen that the State undertakes to manage, but the liquor traffic. * * * If, by abolishing the saloon, the State makes it difficult for men to gratify their private appetites, there is no just reason for complaint. * * * It is, therefore, significant that the policy of prohibition stops short of dealing with the private act of consumption."

At page 234 the court uses the following language:

"The power of a State to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses which he keeps to himself, and which do not operate to the determint of others, the State as such has no concern. In other words, the Police Power may be called into play when it is reasonably necessary to protect the public health or public morals or public safety. The mere fact that the legislature sees fit to enact a statute ostensibly for the purpose of promoting such ends is not conclusive of the ques-

tion. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the court so to adjudge, and there give effect to the Constitution. State vs. Williams, supra; Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205. We have in force a statute prohibiting the possession of intoxicating liquor in prohibited territory for the purpose of sale. Under this statute very slight evidence is sufficient to secure a conviction. Where, therefore, the purpose of the owner is unlawful, the above statute is effective. *Here it is sought to go one step further and make the possession for an innocent purpose considered from the standpoint of the police power as much of an offense as if the possession were for an unlawful purpose.* Manifestly, if the legislature has the power to prohibit such possession at places other than one's private residence, then it has the like power to prohibit such possession even at a private residence, and this was exactly what was held in Conmonwealth vs. Campbell, supra, could not be done. There must be of necessity limits beyond which the legislature cannot rightfully go. We think that limit is reached when it prohibits such possession for sale or other unlawful purpose. It cannot go further and prohibit such possession or limit the place of possession where the liquors are intended for one's own use, and, therefore, for a purpose with which the police power of the state is not concerned. It will not do to say that because some persons may evade the law as it now exists, others who have no intention of violating the law should be denied their constitutional rights. As this is the effect of Section 4 of the act in question, we concur in the ruling of the circuit judge that the section is unconstitutional and void."

Joyce on Intoxicating Liquors, Section 85, page 105 very tersely states our position in this matter:

"While the state in the exercise of the police power may

prohibit the sale or giving away of intoxicating liquors yet this power is one which is justified by the fact that such legislation is to protect the public health, morals and safety, and as such liquors may be legitimate subject of property the state cannot prohibit one from having them in his possession and ownership when such possession and ownership is for his own personal use and is not injurious to the public. This question is considered in a recent case in Kentucky where the constitutionality of a state prohibiting a person from having intoxicating liquor in his possession was considered. The court said: 'The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the constitution and cannot be abridged as long as the absolute power of a majority is limited by our present constitution. The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or, as it has been otherwise expressed, that government is best which governs the least. * * * We hold that the police power vague and wide and undefined as it is has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim "Sic utere auo ut allenum non laedas." * * * (35) So a statute prohibiting the keeping of intoxicating liquors for sale does not apply to liquors which are kept by a person entirely for his own use. (36) And it has been decided that a code provision that no person shall, without a state license therefor, 'keep in his possession, for another, spirituous liquors' is unconstitutional as being an abridgement of the privileges and immunities of the citizen without any legal justification." (37).

The Supreme Court of Illinois, in the case of Sullivan v.City of Oneida, reported in 61 Ill. 242, had under consideration an ordinance similar in purpose and involving the principle here under discussion, and held such provision invalid. Among other things, the Court says:

"Spirituous liquors, ale and beer, are property, as much

so as money or lands. They are chattels; are articles of consumption and of commerce. The ordinance recognizes them as property and directs their sale on execution, and permits druggists to keep them. Their abuse may be restrained, and punishment inflicted upon those who sell them to the injury of others. They may, as well as other chattels, come under the designation of nuisance, and, to a certain extent, lose their quality as property, but they cannot, per se, lose their quality as property."

And again, "The Legislature may change the law and increase the presumptions of guilt. It may, to a certain extent make acts evidence of an unlawful intent which had before been innocent. It may declare the possession of certain articles of property, on account of their highly dangerous character, unlawful. But such laws must always have proper safeguards for the security of private rights."

The foregoing doctrine was approved by the same court in the case of Cortland vs. Larsen, 273 Ill. 602 (113 N. E. 52).

"The exercise of the police power is limited to enactments tending to promote the public health, safety and moral or general welfare. It is for the legislature to determine *when* an exigency exists for the exercise of the police power, but what is the *subject* of such exercise is a judicial question."

Haskell vs. Howard, 269 Ill. 550.

Maine heretofore had a statute very similar to the one above quoted. It might be of some purpose to quote the language of the Court in Preston vs. Drew, decided by the Supreme Court of Maine, and found on page 641, 54 Am. Dec., as follows:

"While the act provides for the seizure and forfeiture of the liquors designed for sale, in violations of its provisions, no positive enactment is found that no persons shall acquire any property in them. Nor is there any language capable

of receiving such a construction as would forbit it. The prohibition to sell them cannot prevent any person from acquiring and possessing them for his own use, without any intention to sell them. Nor can it prevent their transport from one town or city to another, or through the state, when there is no intention to make sale of them. There is nothing found in the act indicative of an intention to prevent their being property, when thus possessed or used. On the contrary, the act authorizes them to be legally sold and used for certain purposes and therefore to be the subject of property, for such purposes. If they cannot be the subject of property, the town or city agents can have no property in them, nor can they or the towns or cities, by any action, obtain redress for their lawless and wanton destruction.

"It is, however, insisted in argument, that a person, by the common law, can no more acquire property in spirituous and intoxicating liquors, than he can in obscene publications and prints. There is a clear and marked distinction between them. Such liquors may be applied to useful purposes. This is admitted in the act, by its authorizing their sale for medicinal or mechanical purposes. It is their misuse or abuse alone which occasions the mischief. Obscene publications and prints are in their very nature corrupting, and productive of evil. They are incapable of any use which is not corrupting and injurious to the moral sense.

"Such liquors are also alleged to be a common nuisance, and as such liable to destruction. There is nothing which can be regarded as a nuisance, when considered by itself alone and separate from its use. It is the improper use or employment of a thing which causes it to become a nuisance. It would not be a little absurd to declare that to be a nuisance and as such liable to be abated and destroyed, which the act allows to be sold and purchased as an article useful for medicinal and mechanical purposes."

III

It has been held by a number of courts of last resort in the

United States, passing upon statutes similar to the one under discussion, that such statutes, prohibiting the mere possession of intoxicating liquor for one's own use, are not a legitimate exercise of the police power, in that such possession is not inherently injurious to the health, morals or safety of the public, and that the enactment of such statutes is an attempt at the abridgment of the privileges and immunities of the citizen, without legal justification, is confiscation of property without due process of law, and such statutes are void.

Commonwealth vs. Campbell, 133 Ky., 50;
Eidge vs. Bessemer, 164 Ala., 599;
French vs. Birmingham, (Ala.), 51 So., 254;
Sullivan vs. Oneida, 61 Ill., 242;
State vs. McIntyre, 139 North C., 599; 52 S. E. 63;
State vs. Williams, 146 N. C., 618; 14 Ann. Cas., 562.
State vs. Gillman, 33 Va. 146; 6 Law Rep. Ann., 847;
Ex Parte Wilson, 119 Pac. 596.

In Commonwealth vs. Campbell, supra, which is a case on all fours with the case at bar, the court uses the following language:

"It will be observed that the warrant issued against the defendant charges him with bringing into the town spirituous, vinous or malt liquors upon his person or as his personal baggage, exceeding a quart in quantity. So far as the warrant is concerned, therefore, there is nothing to negative the idea but what the defendant had the liquor for his own use, and for no other purpose. We presume it will not be controverted that if the council could limit the quantity of liquor which a person might have in his possession for his own use to a quart, it could prohibit his having in his possession any quantity whatever. *We are confronted, therefore, with the*

proposition as to whether or not in this state it is competent under the police power for any legislative body to prohibit the possession or use of liquor by one for his own necessity or comfort. Broadly stated, the question before us is whether or not it is competent for the legislature to prohibit a citizen from having in his own possession spirituous liquor for his own use. It will require no elucidation to show that if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it because, of necessity, no one can drink that which he has not in his possession."

In discussing the question from the standpoint of its constitutionality, the court uses the following language:

"The bill of rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the legislature could prohibit the citizens owning or drinking liquor, when in so doing they did not offend the laws of decency by being intoxicated in public. Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a member of organized society and under governmental regulation he surrenders, of necessity, all of his natural rights, the exercise of which is, or may be, injurious to his fellow citizens. This is the price he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute right of the citizen any further than the direction protection of society requires. *Therefore, the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any*

liberty, the exercise of which will not directly injure society."

The court then quotes at length from Blackstone's Commentaries to the effect that the rights of persons, considered in their own capacities, are of two sorts, absolute and relative; that absolute rights are such as pertain and belong to particular men, merely as individuals, or single persons, and such as belong to other persons and which they are entitled to enjoy whether out of society or in it, and that the citizen has the right to enjoy such absolute rights, and provided he does not offend against the rules of public decency he is out of reach of human law.

The Court then quotes at length from one of the greatest disciples of liberty, John Stuart Mill. The following is a portion of the quotation:

"He (the citizen) cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of anyone for which he is amendable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Pages 22, 23." "And again, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our character; the doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong. Page. 28."

The Court then quotes from Black on Intoxicating Liquors, as follows: (Page 50, Sec. 38.)

"But it is justly held that a provision in such a law, that no person, without a State License, shall 'keep in his possession for another, spirituous liquors,' is unconstitutional and void. *The keeping of liquors in his possession by a person, whether for himself, or another, unless he does so for the illegal sale of it, or for some other improper purpose, can, by no possibility, injury or affect the health, morals or safety of the public and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen, without any legal justification, and therefore void.*"

The Court then cites and quotes from State vs. Gilliam, 33 W. Va. 146, and State vs. Williams, 146 N. C. 618, which cases are hereinafter discussed.

The Court in this case concludes with the following language:

"It will be observed that the defendant is not charged with having the liquor in his possession for the purpose of selling it, or even giving it to another. The sole charge against him is that he had it in his possession, and therefore we must presume that he had it for a lawful purpose if he could so hold it. Nothing that we have said herein is in derogation of the power of the State under the Constitution, to regulate the sale of liquor, or any other use of it which in itself is inimical to the public health, morals, or safety; *but as spirituous liquor is a legitimate subject of property, its ownership and possession cannot be denied when that ownership and possession is not in itself injurious to the public. The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our Constitution.*"

"Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink, or think thus crushing our individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of the private conduct of mankind. We hold that the police power—vague and wide and indefinite as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim, *'Sic Utere tuo ut alienum non laedas.'*"

IV.

There is a real distinction between the use and abuse of even such articles or substances as alcoholic beverages. In fact this idea has been expressed judicially in Beebe vs. State, 6 Ind. 501, 63 Am. Dec. 391, wherein the court stated that it knew as a matter of general knowledge, and was capable of judicially asserting the fact, that the use of beer, etc., as a beverage, was not necessarily hurtful, any more than the use of lemonade or ice-cream. "And," pursued the learned court, "will the general principle be asserted that to prevent the abuse of useful things, government shall assume the dispensation of them to all the citizens—put all under guardianship? Fire-arms and gunpowder are not manufactured and sold to shoot innocent persons with, but are often so misapplied. Axes are not made and sold to break heads with, but are often used for that purpose in the hands of murderers. Bread is not made to make gluttons with, but is perverted to that use. Razors are not made to cut throats with, but are applied in that way by the suicide. The Almighty did not create fists to knock

people down with, but they are often put to that use, and still He permits men to be born with fists."

Moreover, it should be pointed out that irrespective of any possible injury resulting to the individual from his own personal indulgence there is involved in any proposal to make such indulgence criminal, the larger governmental question as to whether a self-regarding act or vice be a crime unless it is thrust on the attention of the public? In former times laws were sometimes passed limiting individual conduct in ways that are now considered ridiculous, such as fixing the number of courses permissible at dinner, the length of pikes that might be worn on the shoes, etc., but these enactments were founded on the pique or whims of an exact and tyrannical aristocracy rather than on reason, or, as in the case of the old New England blue laws, on views of propriety or religion that do not now obtain with anything like the former degree of strictness. Judge Cooley, in his admirable work on Constitutional Limitations, at page 385, says: "In former times, sumptuary laws were sometimes passed and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law."

In ancient Rome Lelius complained of certain edicts of the Roman Senate (Lex Orchia and Lex Fannia) limiting the number of his guests, and also placing other restrictions on his dinners. But the Roman Senate may have been clearly within its police power. Lelius was noted not only for the num-

ber of his quests, but also for the number of courses at his dinners. He was directly reaching the public.

V.

This feature was clearly indicated by the Hon. Edgar M. Cullen, ex-chief Judge of the New York Court of Appeals, in an address on "The Decline of Personal Liberty in America," delivered at the annual meeting of the New York State Bar Association in New York City, January 30, 1914, published in Law Notes, March, 1914, wherein he says: "Great as are the evils caused by the improper or excessive use of stimulants, people who take wine or liquor in moderation, without injury, at least to others, cannot be expected to surrender their right to do so. At any rate, they will not, despite any laws to the contrary that may be made. The history of such legislation in the states where it has been enacted shows that it has failed to accomplish its object. The result is that law habitually disregarded breeds contempt for law."

The question as to what property a man shall possess, provided that its use affects only himself, should be decided by the individual concerned. That is a principle quite generally accepted by thoughtful men. The greatest need of our time is intellectual *self*-direction and moral *self*-control. Were we to leave all moral control to an external authority we should inevitably enfeeble the individual judgment and the individual will. The power to distinguish between good and evil can be developed only when the individual is confronted with the necessity of making such a distinction; and, likewise, the power to choose between good and evil can be developed only when the individual is re-

quired to make such a choice. If the right to possess alcoholic beverages, even for moderate and innocent use, be denied, then, as far as that subject is concerned, all opportunity for the exercise of the intellect in determining what is good and what is evil, and all opportunity for exercising the will in choosing the good in preference to the evil, is completely eliminated. The elimination of the opportunity for the individual to exercise his own judgment and his own will in such a matter, and his compulsory submission to an inquisitorial and arbitrary statute, not only fails to develop those powers, but it does more. It destroys them. It is an unfailing law that any physical organ or function, and any intellectual or moral power, that is not used declines, decays, and eventually becomes extinct. In our country, where the direction of society is ultimately in the hands of the mass of the people, the decay of the power of *self*-direction is especially dangerous. And that the provisions of the law in question in this case contribute to such decay there seems to be no reasonable doubt. Those provisions have too distorted an idea of wrongdoing. They have too timorous a trust of the individual. The power to know the good and the power to choose it can be developed only in the presence of freedom of choice. Self-direction and self-control are expressive and positive in their character, whereas the provisions of the statute now under consideration are merely repressive and negative. Repression and negation in matters that concern only the individual are always detrimental to character. They are always in the highest degree anti-educational. They cause the decline of self-reliance; they starve, and stunt, and extinguish the faculties. The only thing

that, through the long ages of man's slow ascent from barbarism to civilization, has separated the moral from the immoral life is the ability to distinguish the good from the evil and the will to choose the good. And only where "the winds of freedom are blowing" can such faculties be developed.

The Idaho Court in the case at bar practically holds that the fiat of the Legislature is law. The Court reverses the opinions of all the authorities we have quoted on the point and declares that the *subject* of the Police Power is *not* left for judicial determination. Many propagandists are found in the West who maintain that tea and coffee, meat and tobacco are clearly within the Legislative control. If the position of the Idaho Court be correct, then the private possession of these things, too, may be denied to the citizen. It is surely desirable that the highest court in our land should declare in unmistakable terms that the police can not invade and determine the purely private affairs of any individual. Otherwise that power will be left in its present ambiguous and gelatinous condition, ready for the use of the wildest of fanatical ideas. And the limiting of the police power to its proper scope, to the safeguarding of the public welfare, would in no wise impair that power, but, on the contrary, would make its application all the more certain and definite and its authority all the more impressive. Nothing could be more undesirable than to have a wide-reaching governmental power left in an indefinite, vague, amorphous, and disturbing condition, and therefore provocative of unnecessary litigation.

The three Sections of the Act herein challenged have no sanction in the Constitution of Idaho. At the general election in No-

vember, 1916, the following amendment to the Constitution of Idaho was ratified by the people of the State:

"Shall the Constitution of the State of Idaho be amended by adding to Article 3 thereof a new section forbidding the manufacture, sale, keeping for sale, and transportation for sale of intoxicating liquors for beverage purposes from and after the first day of May, 1917, and requiring the Legislature to enforce such amendment by all needful legislation?"

The prohibition proposition may be sumarized as follows:

"All the evils of the liquor traffic are not so great as would be the coddling of people by the State under prohibition. Teach the man to keep away from liquor, rather than to try to keep the liquor away from the man. Prohibition has not worked successfully anywhere over any large area for very long. Turkey? Well, consider Turkey as it is. Everybody should not be denied a thing because that thing is bad for somebody, but not bad in itself. There are evils of sex, let us say. Does anyone propose sterilization to cure them? No, we regulate sex, so far as we can, by marriage laws. Want and woe follow in liquor's train? Yes! But there's nothing good that has not its bad. Shall we extirpate all good things to get rid of the bad attached thereto?

"Regulate and restrict liquor as we do drugs. That is all right. But prohibit them absolutely? No! Because we can't do it successfully. Because if we could, we would drive men and women to other and worse evils. The State can't save anybody's soul. The individual must do that. If the State goes in for soul-saving most of us will find that the process will amount to telling us our souls are not our own. Welcome, the Inquisition! The Liquor evil diminishes. Prohibition is not the cause, but education, enlightened self-interest, realization that it is best to let liquor alone if one is to get the best of life. The liquor evils die because men keep themselves from drinking, not because the State keeps

liquor from men. We cannot be legislated either wise or moral.'

We respectfully submit that the Sections referred to of the Statute are repugnant to the Fourteenth Amendment, and that the judgment of the Supreme Court of Idaho should be reversed.

J. H. FORNEY,
Counsel for Plaintiff in Error.

A. H. OVERSMITH, of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1916

No. 53

ED. CRANE,
Plaintiff in Error,

vs.

J. J. CAMPBELL, Sheriff, Latah County, Idaho,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR DEFENDANT IN ERROR

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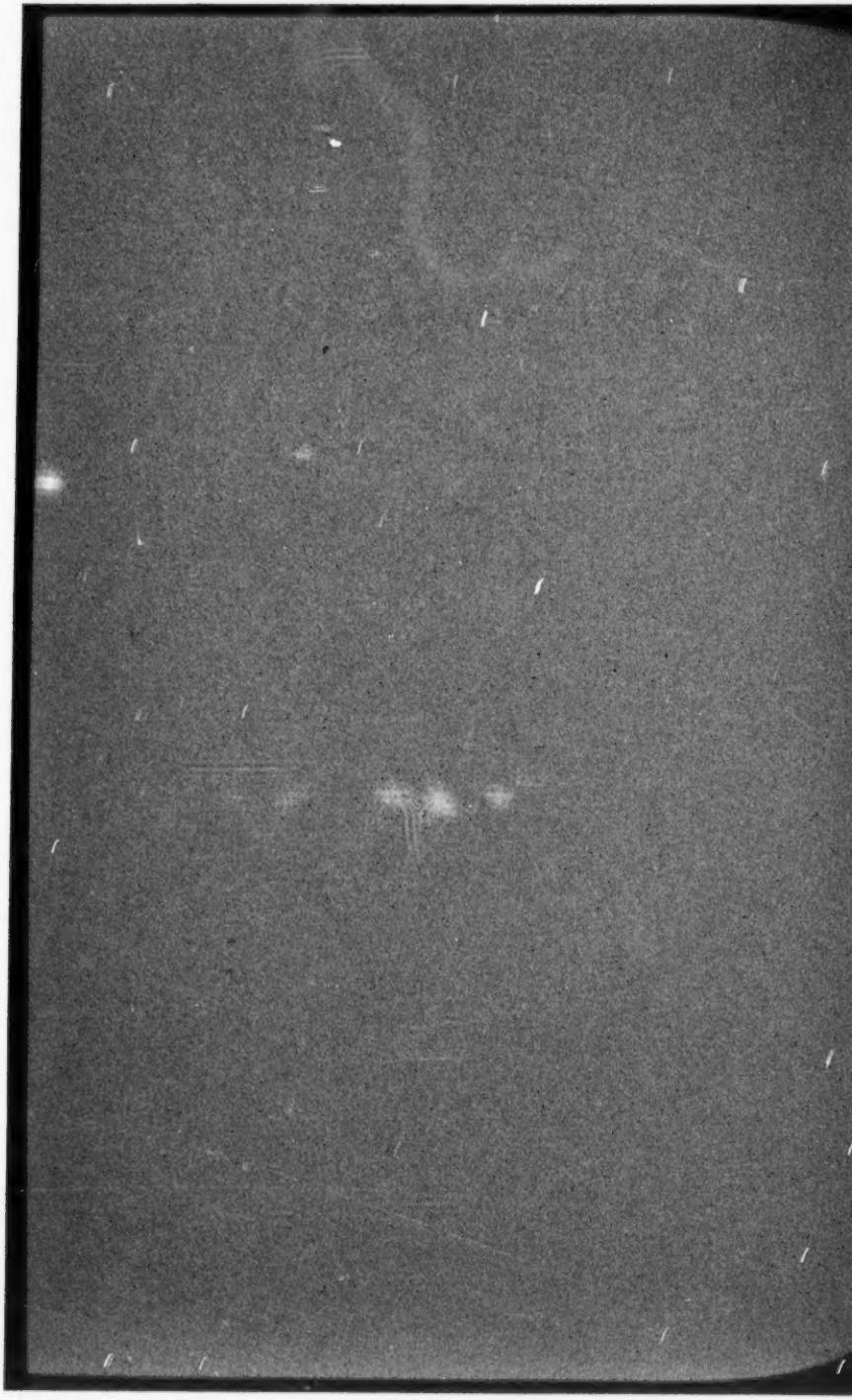

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LIST OF CASES

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1916

No. 300

ED. CRANE,
Plaintiff in Error,

vs.

J. J. CAMPBELL, Sheriff, Latah County, Idaho,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE ISSUES.

We have nothing to add to the statement of the case in plaintiff's brief.

The statute involved is an Act of the legislature approved February 18, 1915, found at page 41, of the Session Laws of

Idaho, 1915, as Chapter 11. The particular parts of the Act complained of are Sections 2, 15 and 22. The Supreme Court of Idaho has held that the Act is not violative of any provisions of the State constitution.

There is no controversy over any issue of fact.

The only question to be determined by this Court is: Do the provisions of section one, of the Fourteenth Amendment to the Constitution of the United States, preclude the legislature of the State of Idaho from making the possession of intoxicating liquors, by an individual within the State, a crime?

For the convenience of the Court, we are incorporating herein, a copy of the Act under consideration, and a copy of the agreed statement of facts used in the Supreme Court of Idaho, upon the return of the Writ of Habeas Corpus issued by that Court.

CHAPTER 11.

AN ACT

DEFINING PROHIBITION DISTRICTS AND REGULATING AND PROHIBITING THE MANUFACTURE, SALE, KEEPING FOR SALE, TRANSPORTATION FOR SALE OR GIFT, AND TRAFFIC IN INTOXICATING LIQUORS AND PROHIBITING DRINKING AND DRUNKNESS IN PUBLIC PLACES IN SUCH PROHIBITION DISTRICTS, AND FIXING FINES AND PENALTIES, AND REPEALING CHAPTER 27 AND CHAPTER 99 OF THE SESSION LAWS OF 1913.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. A prohibition district within the meaning of this Act and in all other acts regulating or prohibiting the traffic in intoxicating liquors shall be any county or incorporated

city or village wherein the manufacture, sale, possession, keeping for sale, transportation for sale or gift of intoxicating liquors for beverage purposes is declared unlawful, whether such prohibition district be established by constitutional amendment, legislative enactment, adoption of the provisions of the local option law or by refusal of municipal authorities or county commissioners to grant saloon licenses.

SEC. 2. It shall be unlawful for any person, firm, company, or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol within a prohibition district or to have in his or its possession or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided; *Provided*, That so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole, it shall not be unlawful for any person, company or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of a prohibition district: *Provided*, That nothing in this Act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol.

SEC. 3. Before a pharmacist shall be authorized to transport pure alcohol for scientific or mechanical purposes or for compounding or preparing medicines, as provided by this Act, he shall procure a permit for that purpose from the Probate Court.

SEC. 4. To procure such a permit, a pharmacist shall make and file with the Probate Court of the county where the pure alcohol is to be used, a statement in writing, under oath, stating that he desires to transport pure alcohol for scientific or mechanical purposes, or for compounding, preparing or preserving medicines only, as provided by this Act, and giving his name, the location of his business, a statement that he is a licensed pharmacist, that he is regularly engaged in the practice of his profession at the location named and that he will not violate any provision of this Act.

SEC. 5. If the Probate Court is satisfied of the good faith of the applicant, he shall issue to such pharmacist a permit to transport pure alcohol for compounding, preparing or preserving medicines, or for scientific or mechanical purposes. Such permit shall be in the following form:

Permit to Pharmacists to Transport Pure Alcohol for Compounding, Preparing and Preserving Medicines Only, or for Scientific or Mechanical Purposes.

State of Idaho,)
)ss.
County of .....)

....., a pharmacist residing at ....., is hereby permitted to transport pure alcohol for compounding, preparing and preserving medicines only or for scientific or mechanical purposes. This permit can only be used for one shipment and will be void after twenty days from the date of issue.

By order of the Probate Court.

Dated this.....day of....., 19....

.....

Probate Judge.

SEC. 6. The said permit mentioned in Section 5 hereof shall be issued upon forms supplied by the Probate Court and shall obtain the permit, a copy of the application for permit and a copy of the provisions of Section 7 of this Act, and shall be used under the seal of the Court and shall be void for transportation purposes after twenty days from the date of issuance. The Probate Court shall keep in a separate book provided for that purpose a record of permits issued under this Act, wherein shall be entered the date and the number thereof, the person to whom issued and the purpose for which issued.

SEC. 7. Said permit shall be attached to and remain affixed in a conspicuous place upon any package or parcel containing pure alcohol, imported into or shipped within the State of Idaho, and when so affixed, shall authorize any common carrier, or any person operating a boat or vehicle for the transportation of goods, wares or merchandise within the State of Idaho, to transport,

ship or carry such pure alcohol. Any person so transporting such alcohol shall, before the delivery of such package or parcel, cancel said permit and so deface the same that it cannot be used again.

SEC. 8. All express companies, railroad companies, public or private carriers, are hereby required to keep a separate book in which shall be entered, immediately upon receipt thereof, the name of the person to whom pure alcohol is shipped, from what city or town and state the same was shipped, and the name of the shipper and the amount and kind received, the date when received, the date when delivered and to whom delivered; after which record shall be a blank space in which the consignee shall be required to sign his own name in ink before such pure alcohol is delivered to such consignee, which book shall be open to the inspection of the public at any time during business hours of the company, and shall not be removed from the county wherein the same is required to be kept. A copy of entries upon any such record herein provided to be kept, when certified to by the agent of any express or railroad company, or any public or private carrier in charge of the same, shall constitute prima facie evidence of the facts therein stated in any court of this State.

It shall be unlawful for any person, firm or corporation, or agent to ship alcohol or intoxicating liquor to a false or fictitious name or person or any person to receive or receipt for alcohol or intoxicating liquor in a false or fictitious name.

SEC. 9. Any common carrier or any person operating a boat or vehicle for the transportation of goods, wares or merchandise may accept for transportation, and may transport to any such prohibition territory within the State of Idaho, shipments of wine for sacramental purposes, when there is attached to such shipments a certificate in substantially the following form:

"I, or we, certify that this package contains only..... (amount) of.....wine, which has been ordered by ....., who represents himself to be a duly authorized and officiating priest, or minister of the.....church at....., Idaho, and that said wine is desired for sacramental purposes only.

.....
Signature of Shipper.

SEC. 10 Whenever a shipment of wines for sacramental purposes shall have been transported for delivery within prohibition territory, the delivering agent of the transportation company must refuse to deliver the same unless it is accompanied by the certificate prescribed in Section 9 of this Act, and then only to the person to whom the same is addressed, or upon his written order. The transportation company must keep a record of all shipments and deliveries of wines for sacramental purposes, and must preserve for a period of one year after their receipt, all certificates accompanying such shipments, and all written orders upon which deliveries may be made. Such records must be open to the inspection of the public at any time during office hours.

SEC. 11. Any person who shall desire to purchase pure alcohol for scientific or mechanical purposes shall apply to the Probate Court for a permit for that purpose. To procure such permit he shall make and file with the Probate Court of the county where the pure alcohol is to be used, a statement in writing, under oath, stating that he desires to purchase pure alcohol for scientific or mechanical purposes as provided by this Act and giving his name and residence and the place at which such pure alcohol is to be used.

SEC. 12. If the Probate Court is satisfied of the good faith of the applicant, he shall issue to said applicant a permit to purchase pure alcohol for scientific or mechanical purposes. The original of said permit shall have attached thereto a duplicate copy and each shall be numbered with the same number and be in substantially the following form:

State of Idaho)
)ss.
County of .....)

....., residing at.....,
is hereby permitted to purchase pure alcohol in the amount of .....(here insert quantity) .....to be used for scientific or mechanical purposes. This permit can only be used for one purchase and the copy hereof attached shall be conspicuously pasted upon the package containing said alcohol and this permit to purchase shall be void after twenty days from the date hereof.

By order of the Probate Court.

Dated this.....day of....., 19.....

.....

Probate Judge.

SEC. 13. The permit mentioned in Section 12 shall authorize the applicant to purchase and any pharmacist to sell and deliver to him the quantity named in the said permit. The permit shall be cancelled, kept and retained on file for at least one year by the pharmacist so selling said pure alcohol and the copy of said permit shall be, by the pharmacist, conspicuously pasted upon said receptacle containing said alcohol and shall so remain upon said receptacle so long as the same shall contain alcohol. Said permit and copy shall only authorize one purchase and sale. It shall be unlawful for any pharmacist to sell pure alcohol without the permit herein specified or for any person to keep or have in his possession any pure alcohol unless the receptacle containing the same shall be distinctly labeled with the copy of the permit authorizing the purchase of the same.

SEC. 14. It shall be unlawful for any person, owning, leasing or occupying or in possession or control of any premises, building, vehicle, car or boat to knowingly permit thereon or therein the manufacture, transportation, disposal or the keeping of intoxicating liquor with intent to manufacture, transport, or dispose of the same, in violation of the provisions of this Act.

SEC. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided.

SEC. 16. Any person who shall, in a prohibition district, in any public place or in or upon any passenger coach, street car, boat, or in or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform or waiting room, drink any intoxicating liquor of any kind, or any person who shall be drunk or intoxicated in any public or private road or street, or in any passenger coach, street car or any public place or building, or at any public gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, he shall be guilty of a misdemeanor.

SEC. 17. Whenever in this Act an offense is defined as a

misdemeanor, the same shall be punishable under Section 6313 of the Revised Codes of Idaho.

SEC. 18. Any person convicted of violation of any of the provisions of this Act where the punishment therefor is not herein specifically provided, shall be punished by a fine of not less than Fifty ($50.00) dollars nor more than Five Hundred ($500.00) dollars, and by imprisonment in the county jail for not less than thirty days, nor more than six months.

SEC. 19. A person having once been convicted of a violation of any of the provisions of this Act, except Section 16, who thereafter violates the provisions thereof, shall be considered a persistent violator of this Act and shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the State penitentiary at hard labor for not less than one year and not more than two years.

SEC. 20. In case a pharmacist is convicted under the provisions of this Act, the Court shall, in addition to the penalty provided by this Act, revoke his license to practice pharmacy.

SEC. 21. The issuance by the United States of an Internal Revenue Special Tax Stamp or Receipt to any person as a dealer in intoxicating liquors shall be prima facie evidence of the sale of intoxicating liquors by such person during the time the stamp or receipt is in force and effect.

A copy of such Stamp or Receipt or of the record of the issuance thereof, certified to by a United States Internal Revenue officer having charge of such record is admissible as evidence in like case and with like effect as the original Stamp or Receipt.

SEC. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this Act.

SEC. 23. The provisions of Chapter 15, Session Laws of 1911, are hereby specifically extended to and made applicable in the enforcement of this Act.

SEC. 24. Chapter 27, Session Laws of 1913, and Chapter 99,

Session Laws of 1913, and all other Acts and parts of Acts in conflict herewith are hereby repealed.

SEC. 25. It is expressly declared that should any Section, part or portion of this Act be declared unconstitutional or void, such invalidity shall in no way affect the remaining portions of said Act.

Approved, February 18, 1915.

IN THE SUPREME COURT OF THE STATE OF IDAHO

In re ED CRANE.

Agreed Statement of Facts on Application for Writ of Habeas Corpus.

Now come J. H. Forney and A. H. Oversmith, attorneys for Ed Crane, the petitioner herein, and Frank L. Moore, the Prosecuting Attorney of Latah County, State of Idaho, and stipulate and agree as follows:

First: That the said Frank L. Moore is now, and was at all the times herein mentioned, the duly elected, qualified and acting Prosecuting Attorney of Latah County, State of Idaho.

Second: That J. J. Campbell is now, and was at all times herein mentioned, the duly elected, qualified and acting Sheriff of Latah County, State of Idaho.

Third: That the said Ed Crane is now, and was at all the times hereinafter mentioned, a resident of the County of Latah, State of Idaho.

Fourth: That on the 16th day of May, 1915, the said Ed Crane had in his possession a bottle of whiskey for his own use and benefit, and not for the purpose of giving away or selling the same to any person.

Fifth: That thereafter a complaint was duly filed by the said Prosecuting Attorney charging the said Ed Crane with the crime of having whiskey in his possession, and that thereafter on a preliminary examination therefor, the said Ed Crane was duly committed to the custody of the Sheriff of the said Latah

County, State of Idaho, in default of bond, and now is confined in the county jail of said County of Latah, State of Idaho, and that said commitment and confinement was solely and only because he had violated Sections 2, 15 and 22 of Chapter 11 of the 13th Session Laws of the State of Idaho, approved February 18, 1915.

Sixth: That Latah County is now, and was at all times herein mentioned, a Prohibition District within the meaning of the Act referred to, Chapter 11 of the Session Laws of 1915 of the State of Idaho.

Seventh: That the bottle of whiskey referred to was not obtained and possessed under any permit authorized by the said Act.

Eighth: That thereafter an Information was duly filed by the said Prosecuting Attorney charging the said Ed Crane with the offense aforesaid, a copy of which said Information is hereto attached, marked "Exhibit A," and made a part hereof.

Ninth: It is further stipulated that the production of the body of the said Ed Crane at the hearing before the Supreme Court is hereby waived, and that the merits of said cause may be heard on the application for said writ.

Tenth: Counsel of petitioner contend that the provisions of Sections 2, 15 and 22, Chapter 11 of the Act referred to are in contravention of the Fourteenth Amendment to the Constitution of the United States, and also of Section 13, Article 1 of the Constitution of the State of Idaho, and that said provision is not a reasonable exercise of the police power of the State, and is for that reason void.

FRANK L. MOORE,
Prosecuting Attorney for Latah County, State of Idaho.

A. H. OVERSMITH,
J. H. FORNEY,
Attorneys for Petitioner.

POINTS AND AUTHORITIES

I.

Chapter 11 of the Idaho Session Laws of 1915 does not violate, in any particular, any provision of Section one of the Fourteenth Amendment to the Constitution of the United States.

License cases, 5 How. 504, 12 L. Ed. 256.

Foster vs. State of Kansas, 112 U. S. 205, and notes.

Muglar vs. Kansas, 123 U. S. 623, 31 L. Ed. 205.

Rosenthal vs. People of the State of N. Y., 226 U. S 260, 57 L. Ed. 212.

Purity Extract & Tonic Company, et al, vs. Lynch, 226 U. S. 192, 57 L. Ed. 184.

Slaughter House cases, 83 U. S. 36, 21 L. Ed. 394.

II.

The possession of property may be made a crime by the State in the exercise of its "police power."

People of the State of New York, ex rel., August Silz, Plff. in Err. vs. Henry Hesterberg, Sheriff of the County of King, 211 U. S. 31.

Purity Extract & Tonic Company, et al, vs. C. C. Lynch, 226 U. S. 192.

Benjamin Rosenthal, Plff. in Err., vs. People of the State of New York, 226 U. S. 260.

Magner vs. People, 97 Ill. 320.

Phelps vs. Recy, 60 N. Y. 10.

State of Indiana vs. David Lewis, 20 L. R. A. 52.

State vs. Randolph, 1 Mo. Appeals, 15.

Terr. of Washington vs. Ah Lim, 9 L. R. A. 395.

Luck vs. Sears, 44 Pac. 693 and cases cited in the opinion.

State vs. Keeny, 145 Pac. 450.

ARGUMENT

PRIVILEGES AND IMMUNITIES OF PLAINTIFF IN IN ERROR.

As we understand it, the contention of the plaintiff in error is: That the provisions of the Act of the legislature of Idaho, complained of, invade his rights under the "immunity clause," and the "due process clause," of section one, of the Fourteenth Amendment to the Constitution of the United States.

The question first presenting itself to us naturally is:

> "What are the privileges and immunities of citizens of the United States which can be abridged by the State legislature?"

The Nationalist School of Publicists, represented by Professor Burgess, contend and advance sound historical argument to show that it was the purpose of the men who framed this paragraph of the Amendment, to nationalize civil liberty, by setting up against the States those privileges and immunities which of right belong to the citizens of all free governments,—that is, in particular, those privileges and immunities guaranteed to citizens against the federal government in the first ten amendmendments to the Constitution.

This Court, however, in our opinion, has refused to accept this interpretation of the Amendment, by holding that there is a difference between the rights belonging to a citizen of the United States as such, and those belonging to a citizen of a State as such and that the citizens of a State must depend for their security and protection upon the State, the same as before the adoption of the Fourteenth Amendment.

Speaking of this Amendment, Mr. Justice Miller, in the slaughter house cases says:

"The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

"It is quite clear then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual. * * * The constitutional provision there alluded to (the Fourteenth Amendment) did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

"Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more or less, shall be the measure of the rights of citizens of other States within your jurisdiction. * * * Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Governments? And where it is declared that Congress shall have the power to enforce that article, was it intended to

bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow, if the proposition of the plaintiff in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgment of the Supreme Court of Louisiana in these cases, would constitute this Court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this Amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching, and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people; the argument has a force that is irresistable, in the absence of language which expresses such a purpose too clearly to admit of doubt.

"We are convinced that no such results were intended by the Congress which proposed these Amendments, nor by the Legislatures of the States, which ratified them."

This rule was adopted by a divided Court, Chief Justice

Chase, Mr. Justice Field, Mr. Justice Swayne, and Mr. Justice Bradley dissenting. Mr. Justice Field, Mr. Justice Swayne, and Mr. Justice Bradley, each writing strong dissenting opinions, insisting that the expression, "privileges and immunities," used in this clause of the Amendment, referred to the "fundamental rights of a free people." Taking the position that a citizen of the United States must of necessity be a citizen of some one of the States. The rule announced by Mr. Justice Miller in the majority opinion, however, has been universally followed by this Court.

Considering the provisions of the Act of the Idaho legislature complained of, in the light of this rule, we respectfully submit that there is nothing therein that abridges any of the privileges or immunities of the plaintiff in error, Ed. Crane, as a citizen of the United States as distinguished from the privileges and immunities of a citizen of the State of Idaho. The law operates alike upon all persons within the State of Idaho, whether a citizen of Idaho or a citizen of the United States.

Further, the plaintiff in error, Ed Crane, is "a resident of Latah County, State of Idaho," (agreed Statement of Facts, paragraph Third, page 9 of this brief) and therefore, if a citizen of the United tSates is a citizen of the State of Idaho, and has no privileges or immunities as a citizen of the United States, that may be abridged by the making or enforcing of any law by the State of Idaho.

PROPERTY RIGHTS OF PLAINTIFF IN ERROR.

The second contention of plaintiff in error is, that the Act of the Idaho legislature complained of deprives him of his property in the whiskey, in violation of the due process clause of section one of the Fourteenth Amendment to the Constitution of the United States, and following the position taken by a few State Courts argues that the citizen may acquire property rights in whiskey, which may not be interfered with by the State.

We admit that a property right may be acquired in any tangible thing. But the State may destroy property owned by the individual citizen in the interests of the public. For example, the State may destroy counterfeit money, tools for making such money, burglary tools, diseased meats, unwholesome foods, intoxicating liquors introduced into the Indian country, intoxicating liquors upon which internal revenue has not been paid, all manner and kinds of implements used in the manufacture of "moonshine," whiskey, any premises infected with dangerous, contagious diseases, any erection or construction by man that amounts to a nuisance, and any and all tools, implements, or appliances the general use of which is for the commission of crime.

But the property rights of the plaintiff in error in the whiskey, which he is charged with having possessed is not in question, because it is not interfered with by any provision of the Act complained of. The sections of the statute pertinent to this issue provide only, that, possession of intoxication liquors in a prohibition district is unlawful, unless such possession is pursuant to the proviions of the Act authorizing a permit allowing the possession and use of intoxicating liquor, and such unlawful pos-

session of intoxicating liquor by the individual is made a crime regardless of whose property the liquor may be.

The whiskey which the plaintiff in error had in his possession may have been the property of any other person, and still his possession would have been in violation of the law.

Section 20 contains the only provisions of the Act for taking the property of the individual, and of this section the plaintiff in error is not complaining.

The plaintiff in error Ed Crane, is guilty of the offense charged, if, at the place alleged and upon the day alleged, he had a quantity of whiskey in his possession, and before the filing of the information he had exercised the right of ownership (if he was the owner thereof) by consuming or drinking, as a beverage, all of the whiskey in his possession.

In no sense is this a proceeding to punish Ed Crane for drinking whiskey, or to take away from him, whiskey which he had in his possession. We therefore respectfully submit that the taking of the property of the plaintiff in error is not in any sense an issue before the Court.

HOLDING OF STATE COURTS.

The Supreme Courts of the several States of the Union are not in harmony upon an interpretation of the "Immunity clause," and the "Due process clause," of this Amendment to the Federal Constitution and the construction of State legislation pertaining to the control of the liquor traffic thereunder. It is absolutely impossible to reconcile the very divergent positions of some of them.

All Courts of last resort now agree, that the State may under what we denominate its "Police Power," prevent the use of intoxicating liquors, as a beverage, by legislation prohibiting the manufacture, sale or giving away thereof within the State.

It must be admitted that such legislation has succeeded in its purpose in only a limited degree, varying of course in different jurisdictions. This is so, because there are men who will manufacture intoxicating liquors in violation of law, and there are men who will sell and give away intoxicating liquors in violation of law.

Several of the States in recent years have enacted legislation making the possession of intoxicating liquors, under certain conditions, a crime. Such conditions go to the quantity, the place where, and the purpose for which it is possessed.

The State of Idaho has made its possession without a permit obtained in the manner provided by the Act under consideration a crime. It is respecting this legislation pertaining to the possession of intoxicating liquors by the individual, that the Supreme Courts of several of the States are at variance.

The State Courts holding that such enactments are in violation of the "Immunity clause," of subdivision one of the Fourteenth Amendment to the Constitution, base their position upon the ground that this clause guarantees to the citizen of a State as well as to a citizen of the United States certain, fundamental, inalienable rights, conspicious among which is the right to acquire and possess property, and to use the same in any manner and for any purpose, so long as such possession and use does not injure another.

As we understand it this is the contention of the plaintiff in error.

Counsel for plaintiff in error on pages 4 and 5, of his brief says:

> "It is conceded that the privileges and immunities here protected, are such only as are in their nature fundamental; such as belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states of the Union, from the time of their becoming free, independent, and soverign. What these fundamental rights are, it is not easy to enumerate; the Courts preferring not to describe and define them in a general classification, but to decide each case as it may arise. The following however, have been held to be embraced among them: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, *subject to such restraints as the government may justly prescribe for the general good of the whole.* (Italics are ours.) * * * These are inalienable and indefeasible rights which no man, or set of men, by even the largest majority, can take from the citizens. They are absolute and inherent in the people, and all free governments must recognize and respect them. Therefore, it is incumbent upon the Courts to give to the constitutional provisions which guarantee them a liberal construction, and to hold inoperative and void all statutes which attempt to destroy or interfere with them."

With this statement as an abstract proposition of law, we have no contention. But it can not be applied to every condition, nor to every individual citizen, because at times the government takes the life of the citizen as punishment for crime. This is the very highest invasion of these rights; the greatest injury that can be done an individual. Nor can an individual acquire

or possess property that injures others to the extent, that it become a nuisance. Nor can he pursue or obtain happiness by acts or conduct that in interfere with the rights of others to their injury.

For further comment upon this position, we are constrained to quote from the opinion of Justice Dunbar in the case of Territory of Washington vs. Ah Limm reported in book 9, L. R. A. 395. .The case is identical in principle with the case at bar. Ah Limm was convicted of the crime of smoking opium. He appealed to the Supreme Court of the Territory and attacked the sufficency of the indictment. In disposing of the argument of counsel for Appellant, that the statute complained of was violative of Section one of the Fourteenth Amendment to the Constitution of the United States, Dunbar Justice says:

> "It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of well defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society. Natural rights and liberties of a subject are relative expressions, and have relative or changeable meanings. What would be a right or liberty in one state of society would be an undue license in another. The natural rights of the subject, or his rightful exercise of liberty in the pursuit of happiness, depends largely upon the amount of protection which he receives from the government. Governments, in their earlier existence, afforded but little protection to their subjects. Consequently the subject had a right to pursue his happiness without much regard to the rights of the government. The reciprocal relations were not large. He yielded up but little, and received but little. If he was strong enough to buffet successfully with the world, all well and good. If not, he must

live on the charity of individuals or die, neglected, on the highway. But now all civilized governments make provisions for their unfortunates, and progress in this direction has been wonderful even since noted sages like Blackstone lectured upon the inalienable rights of man. Not only is protection of individual property becoming more secure, but the vicious are retrained and controlled, and the indigent and unfortunate are maintained, at the expense of the government, in comfort and decency; and the natural liberties and rights of the subject must yield up something to each one of these burdens which advancing civilization is imposing upon the State. It is not an encroachment upon the time-honored rights of the individual, but it is simply an adjustment of the relative rights and responsibilities incident to the changing condition of society."

This same question was before the same Court in State vs. Keeney, 145 Pacific, 450.

Keeney was convicted under a State statute, upon a charge, of giving liquor to an Indian of mixed blood, born in the United States, to a white father and Indian mother.

In the Supreme Court he urged the contention that the Washington statute abridged the "privileges and immunities" of a citizen of the United States, guaranteed to him by subdivision one of the Fourteenth Amendment to the Federal Constitution, by making the act of giving intoxicating liquor to an Indian of mixed blood, a crime.

Speaking through Chadwick, Justice, the Court says:

"A citizen cannot claim a constitutional right to get drunk. Neither can he claim a constitutional right to give or sell intoxicating liquor to one of a class that is protected by the law because of its weakness and a disposition to be improvident when accustomed to use liquor even in mod-

erate quantities. If it were so, laws prohibiting the sale of liquors to habitual drunkards, minors, and others to whom its use may result in harm to society could not be sustained. The right of the State to enact the statute complained of does not rest upon any question of citizenship. The Fourteenth Amendment, which is relied on, is therefore no way trenched upon or violated.

"Counsel has made an able argument addressed to the policy of the law and in opposition to our former holdings, but we are inclined to our former position. It is for the Legislature to work out the iniquities of criminal statutes."

IS INTOXICATING LIQUOR A PROPER SUBJECT FOR RESTRICTIVE LEGISLATION.

Upon this phase of the case we cite but two authorities. Licenses cases 5 Howard, 504-12 L. Ed. 256 and quote from the concurring opinion of Mr. Justice Greer as follows:

"I concur with my brethern in affirming the judgment in this and the preceding cases on the same subject, but for reasons differing somewhat from those expressed by the other members of the Court; and as I concurred mainly with the opinion delivered by Mr. Justice McLean in the case of Thurlow vs. Massachusetts, I had concluded to be silent, and therefore am not prepared to express my views at length. I take this occasion, however, to remark, that the true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the causes of disease, pauperism and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

"It has been frequently decided by this Court, 'that the

powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may be safely affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category.

"As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondry importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, *'salus populi suprema lex.'*

"If the right to control these subjects be 'complete, unqualified, and exclusive' in the State Legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested ,imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws must of necessity have full and free op-

eration, according to the exigency which requires their interference.

"It is not necessary for the sake of justifying the State Legislation now under consideration to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the State and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth, and happiness of the people."

In Muglar vs. Kansas 123 U. S. 623-31 L. Ed. 205. Mr. Justice Harlan delivered the opinion of the Court, and we quote therefrom as follows :

"The facts necessary to a clear understanding of the questions, common to these cases, are the following:

Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments (constructed especially for that purpose), for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the Statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occured in the State, and after May 1, 1881, that is, after the Act of February 19, 1881, took effect, and was of beer manufactured before its passage.

"The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced

against the defendants the value of their property will be very materially diminished.

"The general question in each case is, whether the foregoing Statutes of Kansas are in conflict with that clause of the Fourteenth Amendment which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.'

"That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, is made clear by the decisions of this Court, rendered before and since the adoption of the Fourteenth Amendment, to some of which, in view of questions to be presently considered, it will be well to refer.

"In the License Cases, 46 U. S. 5 How. 504 (12:256), the question was whether certain Statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spiritious liquors were repugnant to the Constitution of the United States. In determining that question it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the Court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any Act of Congress. Chief Justice Taney said: 'If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from

prohibiting it altogether, if it thinks proper.' Mr. Justice McLean, among other things, said: 'A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power. * * * The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed.' Mr. Justice Woodbury observed: 'How can they (the States) be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when and where it shall be conducted in articles intimately connected either with public morals or public safety or public prosperity?' Mr. Justice Grier, in still more emphatic language, said: 'The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. * * * Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint or punishment of crime; for the preservation of the public peace, health and morals must come within this category. * * * It is not necessary for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.'

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to deter-

mine such questions so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public saftey.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U. S. 718 (25:501), the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in Marbury v. Madison, 5 U. S. 1 Cranch, 137 (2:60,70), 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed and if acts prohibited and acts allowed are of equal obligation. The courts are not bound by mere forms, nor are they misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the

Courts to so adjudge, and thereby give effect to the Constitution.

"Keeping in view these principles, as governing the relation of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the Courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the Legislature the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the community, to disregard

the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare."

And so (in the language of Mr. Justice Harlan), if in the judgment of the legislature of Idaho, the possession of intoxicating liquor by the individual for his own use, as a beverage, would tend to cripple, if it did not defeat the effort to guard the prohibition community of the State against the evils attending the excessive use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the community, to disregard this legislative determination of that question. So far from such regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of the State of Idaho, might fail, if the right of each citizen to have in his possession intoxicating liquors for his own use, as a beverage, were recognized. Such right does not inhere in citizenship of either the nation or the

State. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the possession of intoxicating drinks for individual use, as a beverage, is, or may become hurtful to society.

THE POLICE POWER.

This Court says in these and other cases that the State by legislation may do the things therein enumerated under what is known as the "police power."

This brings us to a consideration of what is meant by "police power." We are unable to find a concise and comprehensive definition of this phrase. The courts have studiously avoided a definition, prefering to say whether or not an exercise of power by the State is, or is not, within its legitimate "police power." Textwriters have contented themselves with giving us illustrations from the opinions of the Court.

We are constrained to say that the "police power" is the governmental power inherent in the sovereign people of the State to make all laws necessary to conduct its internal affairs in the interest of, and for the benefit of, the people as a whole, whether it be to insure peace, conserve the public health and morals, or to promote the welfare or increase the happiness and prosperity of the people of the State, or to protect or advance their interest in whatever is for the benefit of all.

It is essential to free government that individual rights be secured against governmental tyranny. But since rights guaranteed to the individual may be abused by him to the detriment of the community as a whole, it is likewise essential that the public welfare be secured against individual selfishness. No one

should be permitted to make such use of his personal or property rights as to interfere with a reasonable enjoyment by others of similar rights.

Under our institutions this power has its origin and foundation in the principle or maxim of the law, "Salus Populi Suprema Lex."

ARE SECTIONS 2, 15 AND 22, OF THE ACT, PERTINENT TO THE MATTER OF LEGISLATION?

The next question that suggests itself is: Are the specific sections of the Act complained of, 2, 15 and 22, pertinent to the matter of legislation?

It is unquestionably the object and purpose of the Act under consideration to prevent, in the highest degree attainable, the use of intoxicating liquors, as a beverage, in the Prohibition Districts of the State of Idaho. The legislature of Idaho has determined that this condition could be more nearly realized by making the possession of intoxicating liquors, by the individual, a crime, than was realized under the former law.

Applying now the argument of Mr. Justice Greer in the license cases, recognizing the right of the State to license the liquor business and the argument of Mr. Justice Harlan in Muglar vs. Kansas, recognizing the right of the State to prohibit the manufacture of intoxicating liquors for one's own use, to the case at bar, we feel that there is no ground for the contention of the plaintiff in error, that *his fundamental rights* to have intoxicating liquors in his possession and *to drink* intoxicating liquors are violated by the sections of the Act complained of,

because such sections are not pertinent to the matter of legislation.

First: He has no such fundamental rights, and

Second: The particular sections complained of are pertinent to the matter of legislation.

The argument of some of the courts in support of the position contended for by the plaintiff in error, makes this perfectly plain and actually refutes the propositions it is made to establish and is conclusively convincing that the position of this Court upon the matter is correct.

In Commonwealth vs. Campbell, 133 Ky. 50, relied upon by plaintiff in error and referred to by a majority of the cases cited by counsel in his brief, as bearing upon this particular phase of the case, Barker, Justice, says:

> "It will not require any elucidations to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which is not in his possession. So that, if it is competent for the legislative body of any given city or district, or even the legislature of the State, to prohibit the citizen from having liquor in his possession, then a new and more complete way has been discovered for the establishment of total prohibition, not only in any precinct, town, or county, but throughout the State, because, if it is competent to prohibit the citizen from having liquor in his possession it necessarily follows that he can neither sell or use it, as it is a physical impossiblity to do either without first having had possession of the interdicted liquor."

This is the most cogent argument that has been advanced to uphold the sections of the Act complained of.

The basic object of all prohibition legislation has been the

preservation of individual rights to promote the interests and welfare of society as a whole.

This Court has recognized the right of the sovereign State to wholly prohibit the use of intoxicating liquor, as a beverage, within the State by legislation pertinent to that end.

If, then, it is competent for the legislature of the State to prohibit the manufacture and sale of intoxicating liquor, by the citizen, to prevent his using intoxicating liquors as a beverage, it necessarily follows that the legislature may resort to "a more complete way for the establishment of total prohibition," and to that end, may prohibit the possession of intoxicating liquor by the individual, to prevent the possibility of his selling or using it, for beverage purposes.

The legislature of Idaho undoubtedly recognized that it had discovered "a new and more complete way for the establishment of total prohibition" in Prohibition Districts, and, by the enactment of the legislation under consideration, undertook to make this more complete way operative.

PRIVATE USE OF INTOXICATING LIQUOR.

Counsel for plaintiff in error makes an extensive argument upon the proposition that the intoxicating liquor found in his possession as charged in the information was for his, Ed Crane's, private use, and insists that the right of the individual to acquire and drink intoxicating liquor, is one of the fundamental, inalienable rights of the citizen of a free government, and is supported in this contention by a few decisions from the courts of last resort of some of the States.

We feel that the advocates of this rule are in error for the reason that there is no such thing as a public use of intoxicating liquor. One may drink his liquor in public or exhibit himself in public under the effects of an excessive use of liquor, but this is no more a public use than the riding of a horse, by the owner, along a public street in the ordinary course of his business, is a public use of the horse.

Each, every, and any use of intoxicating liquor is a private use. All evils attending the excessive use of intoxicating liquor, which have been enumerated by this Court, are the result of the private use of liquor. All the evils attendant upon the excessive use of intoxicating liquor are the result of the individual exercising dominion over his property. Because no man drinks intoxicating liquor that is not his property, and he acquires his property therein, either by manufacturing it, or by its sale or gift to him.

Every effort to establish partial or complete prohibition is an effort to prohibit the private use of intoxicating liquor. Every prohibitory law is enacted for the purpose of curtailing or absolutely prohibiting the private use of intoxicating liquor. Now, if the manufacture of liquor for one's own use may be prohibited and made a crime by the State, then why may not the possession of intoxicating liquor for one's own use be made a crime also?

The further thought suggests itself to us, that if the manufacture, sale, giving away and bringing into the State, of intoxicating liquor, may be, and is, prohibited and made a crime by the State, then no man can become possessed of intoxicating liquor, within the State, without the commission of a crime.

Now, if the State may make the possession of that with which a crime may be committed, a crime, it naturally follows that it may make that a crime, which exists only by the commission of a crime. In other words, the possession of intoxicating liquor may be made a crime by the State, when such possession can be had only by violation of laws prohibiting the manufacture, sale, giving away, and importation into the State of intoxicating liquor.

POSSESSION OF PROPERTY MAY BE MADE A CRIME.

On page 5 of his brief, counsel for plaintiff in error says: "It is not denied that the keeping of property which is injurious to the lives, health, or comfort of all persons may be prohibited under the police power."

This statement of the rule is altogether too narrow. It is not necessary that the property, the keeping of which may be prohibited, be injurious to the *lives, health or comfort of all persons.*

Now, in no sense can a gill net made to catch fish be considered "property which is injurious to the *lives, health or comfort of all persons.*" But the Supreme Court of Indiana has held that the possession of a gill net or seine, except it is for the purpose of use in certain waters, specified by statute, in which the use thereof is permitted, may be made a criminal offense by legislative enactment.

State of Indiana vs. David Lewis, 20 L. R. A. 52.

Olds, Justice, speaking for the Court says:

"The property described in this statute is adapted to a particular use. 'Gill net' is defined by Webster as 'a flat

net so suspended in the water that its meshes allow the heads of fish to pass, but catch in the gills when they seek to extricate themselves.' Webster also defines a 'seine' as 'a large net, one edge of which is provided with sinkers and the other with floats. It hangs vertically in the water, and when its ends are brought together or drawn ashore incloses the fish.' The Century Dictionary defines 'gill net' as 'a net which catches fish by the gills,' specifically describing it, while the same dictionary defines a seine as 'a fishing net,' specifically describing it, and the manner in which it is used.

"This statute prohibits the use of gill nets and seines, except certain kinds or in certain waters. They are not a species of property adapted to any other use. The fact that they are made of material harmless in itself and valuable for other uses, does not change the right of the State to prohibit the use of, or the possession of such material when woven into nets used solely for the purpose of catching fish at times and in waters prohibited by statute. The gill net and the seine are made and used exclusively for catching fish, entrapping them, and catching them in large quantities. This method of catching fish the State has a right to prohibit, and if it has the right to so prohibit the catching, why has it not the right also to prohibit persons having an article of property in their possession used solely for such unlawful purposes? In Gentile v. State, 29 Ind. 409, it is held that the legislature of the State has the power under the Constitution to pass laws for the preservation of fish by limiting the time and mode of taking them. In that case it is said: 'Fish are ferae naturae, and as far as any right of property in them can exist, it is in the public, or is common to all. No individual property in them exists until they are taken and reduced to actual possession.' 2 Bl. Com. 392. They are natives of the water. It is there they generate and live and grow, and no individual property in them can attach whilst they remain thus free. But, as they are valuable for food, the public has an interest in their protection and growth.

"We think this states the true rule, and if, as we have

said, the public has an interest in their protection and growth, and the legislature has the right to prohibit their being taken from the waters during certain seasons of the year, and by certain means, then the legislature has exclusive control over the matter, and may prohibit their destruction and prohibit their being taken from the waters in any other manner than that prescribed by statute, for if the legislature has any control over the subject, it has full control, and is the exclusive judge as to the extent and manner in which they shall be lawfully taken from the water. Jamieson v. Indiana Nat. Gas & Oil Co., 128 Ind. 555, 12 L. R. A. 652; Fay v. State, 63 Ind. 560, 30 Am. Rep. 238; State v. Kolsem, 130 Ind. 434, 14 L. R. A 566.

"It does not absolutely prohibit a person having a gill net or seine in his possession; one may lawfully hold possession of either for the purpose of fishing in the waters of Lake Michigan or the St. Joseph River. If the legislature has the right to prohibit the keeping of a seine in one's possession at all, it may prohibit the keeping of a seine in his possession, although it may be lawful to fish with a seine in the Ohio river, as suggested by counsel that persons have the right to do. It is made unlawful to carry concealed weapons, and yet it would not be unlawful to use a weapon one had concealed, in self-defense even to the extent of taking the life of his adversary, though he might be liable for carrying concealed weapons. A law prohibiting the carrying of concealed weapons is not invalid because one has the right, under certain circumstances in self-defense, to take the life of his adversary. Laws prohibiting the carrying of concealed weapons have universally been held valid. This Court in other decisions has held a law valid which regulated the manner of taking fish from the waters of the State and prohibiting their being taken at certain seasons of the year. Stuttsman v. State, 57 Ind. 119; State v. Boone, 30 Ind. 225.

"A statute of New York prohibiting persons having in their possession game birds of certain specified kinds after a certain date, although killed at a time when the law permit-

ted it, or brought from another State where there was no prohibition, was held valid. Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140.

"Many other States have sustained like laws. In Missouri it was held that a law which prohibits the selling or keeping in one's possession of certain game within a certain period of the year is valid, even when applied to game imported from another State, and that such a law is not such regulation of commerce as belongs exclusively to Congress. State v. Randolph, 1 Mo. App. 15.

"To the same effect is the decision in Magner v. People, 87 Ill. 320.

"In Massachusetts it was held that the statute prohibiting persons having in their possession certain specified birds between certain days of the year, did not apply to birds in the possession of a person within the State lawfully taken or killed in another State. Com. v. Hall, 128 Mass. 410, 35 Am. Rep. 387.

"To the same effect is the holding of the Supreme Court in the State of Michigan. People v. O'Neil, 71 Mich. 325.

"But the only difference in these decisions of the several states is in the construction of the statutes. They all hold such statutes valid, although some construe the statute to apply only to game killed within the State, the object of the law being to protect the wild game within the State. The statute of Michigan made the possession of the game prima facie evidence of the violation of the law, by persons in whose possession it was found, and in speaking of this statute the Court in the latter case said: 'It was right and proper for the legislature to cast the burden of proof upon those having such game in their possession when the killing is by law prohibited and fully protects the State from its evasion.'

"Statutes making it a criminal offense in certain cases to have counterfeit money or dies or tools for making counterfeit money in one's possession are universally held valid, though the material out of which they are constructed may

be valuable for other purposes. See also Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346; Kimmish v. Ball, 129 U. S. 217. 32 L. Ed. 695.

"In a matter over which the legislature may properly exercise police power it has the right to so exercise such power although in doing so it affects the property rights of the citizens.

"In Lawton v. Steele, 119 N. Y. 226-234, 7 L. R. A. 134, the Court said: 'There are numerous examples in recent legislation of the exercise of the legislative power to declare property held or used in violation of a particular statute a public nuisance, although such possession and use before the statute was lawful.'"

The principles above announced are almost identical with those involved in the case at bar. Under the provisions of the Act complained of, every possession of intoxicating liquor is not made an offense. Only such possession as exists without a compliance with the law is made criminal.

Sections 2, 15 and 22 of the Act, are only incidents of the efforts of the Idaho legislature to attain an absolute prohibition of the use of intoxicating liquor for beverage purposes.

The statute of New York above referred to by Justice Olds, was before this Court in 1908, in the case of The People of the State of New York, ex rel, August Silz, plaintiff in error, vs. Henry Hesterberg, Sheriff of the County of King, 211 U. S. 31, 58 L. Ed. 75.

This Court held that a State statute making the possession of game out of season a crime, did not deny the "due process of law" guaranteed by the United States Constitution, Fourteenth Amendment, although such game may have been taken from foreign countries during the open season there.

Speaking of this case, Mr. Justice Hughes, in a very recent case, says:

"A strong illustration of the extent of the power of the State is found in New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. Rep. 10. The State of New York, by its forest, fish, and game law, prohibited the possession of certain game during the close season. The statute covered game coming from without the State. It appeared that Silz was charged with the possession of plover and grouse which had been lawfully taken abroad during the open season and had been lawfully brought into the State; that these game birds were varieties different from those known as plover and grouse in the State of New York; that, although of the same families, in form, size, color, and markings, that they could readily be distinguished from the latter; and that they were wholesome and valuable articles of food. This Court affirmed the conviction, saying: 'It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.' It was pointed out that the prohibition in question had been found to be expedient in several States, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country."

Purity Extract & Tonic Company, et al, v. C. C. Lynch, 226 U. S. 192, 57 L. Ed. 184.

If, then, the legislature of Idaho thinks it expedient or neces-

sary (and it is for the legislature alone to determine what is expedient or necessary), to effectually enfore the prohibition laws of the State of Idaho, that the possession of intoxicating liquor be made a crime when such possession is a result of a violation of law, such statutes do not contravene the rights of property guaranteed by subdivision one, of the Fourteenth Amendment to the Constitution of the United States.

In Purity Extract & Tonic Co. et al, vs. C. C. Lynch, this same question was before this Court and Mr. Justice Hughes disposes of it in the following language:

> "Second. Treating the matter, then, as one of local sales, the question is whether the prohibitory laws of the State as applied to a beverage of this sort, is in conflict with the Fourteenth Amendment.
>
> "That the State, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Crowley v. Chrietensen, 137 U. S. 86, 34 L. Ed. 620, 11 Sup. Ct. Rep. 13. It is also well established that, when a State exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184 U. S. 425, 46 L. Ed. 623, 22 Sup. Ct. Rep. 425; Otis v. Parker, 187 U. S. 606, 47 L. Ed. 323, 23 Sup. Ct. Rep. 168; Ah Sin v. Wittman, 198 U. S. 500, 504, 49 L. Ed. 1142,

1144, 25 Sup. Ct. Rep. 756; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. Rep. 10; Murphy v. California, 225 U. S. 623, 56 L. Ed. 1229, 32 Sup. Ct. Rep. 697. With the wisdom of the exercise of that judgment the Court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature—a notion foreign to our constitutional system.

"Thus, in Booth v. Illinois, 184 U. S. 425, 46 L. Ed. 623, 22 Sup. Ct. Rep. 425, the defendant was convicted under a statute of that State which made it a criminal offense to give an option to buy grain at a future time. It was contended that the statute, as interpreted by the State Court, was not directed against gambling contracts relating to the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling. The argument was that it directly forbade the citizen 'from pursuing a calling which, in itself, involves no element of immorality.' This Court, in sustaining the judgment of conviction, said: 'If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to the object, but is a clear unmistakable infringement of rights secured by the fundamental law.' It must be assumed, it was added, that 'the legislature was of the opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time'; and the Court could not say that the means employed were not appropriate to the end which it was competent for the State to accomplish. (Id. pp. 429, 430.)

"The same principle was applied in Otis v. Parker, 187 U. S. 606, 47 L. Ed. 323, 23 Sup. Ct. Rep. 168, which dealt with the provisions of the Constitution of California that all contracts for the sale of shares of the capital stock of any corporation, on margin, or to be delivered at a future day, should be void, and that any money paid on such contracts might be recovered. The objection urged against the provision in its literal sense was that the prohibition of all sales on margin bore no reasonable relation, to the evil sought to be cured; but the Court upheld the law, being unwilling to declare that the deep-seated conviction on the part of the people concerned as to what was required to effect the purpose could be regarded as wholly without foundation. (Id. pp. 609, 610.)"

Should not this Court, in the case at bar, be unwilling to declare that the deep-seated conviction on the part of the people of Idaho as to what is required to affect, within prohibition territory, complete prohibition of the use of intoxicating liquors as a beverage, be regarded as wholly without foundation?

While decisions from the Supreme Court of some of the States support the contention of the plaintiff in error, notably Ex Parte Wilson, from Oklahoma, Ex Parte Williams from North Carolina, Commonwealth vs. Campbell, from Kentucky, we feel that the great weight of authority and especially the position of this Court, is against his contention and that the legislature of Idaho, under and by virtue of its power to control its internal affairs, may at any time upon popular demand, by proper legislation make the possession of property a crime, when such legislation is for the purpose of promoting the peace, prosperity, and public welfare of the people as a whole.

CONSTITUTION OF IDAHO.

Counsel for plaintiff in error, on pages 22 and 23 of his brief, calls our attention to an Amendment to the Constitution of Idaho which was submitted to the Electorate of the State at the general election in November, 1916. This Amendment was proposed by the same legislature that enacted the statutes of Idaho under consideration, and we respectfully submit, that Sections 2, 15 and 22 of the Act come clearly within the direction to the legislature, to enforce the Amendment by all needful legislation, and are pertinent to the objects and purposes thereof.

This Amendment, however, is not the first expression of the will of the people of Idaho upon the question of the liquor traffic. The framers of our Constitution, more than a quarter of a century ago, anticipated the needs of society for similar legislation, and gave us Section 24, of Article 3, which is as follows:

> "The first concern of all good government is the *virtue* and *sobriety* of the people, and the *purity* of the home. The legislature should further all wise and well directed efforts for the promotion of *temperance* and morality."
>
> (The italics are ours.)

Continued agitation throughout the State, for prohibition legislation, has resulted in the passage of this Act and in the adoption of the Constitutional Amendment, referred to by counsel for plaintiff in error.

ARGUMENT OF PLAINTIFF IN ERROR.

We desire to discuss briefly some of the arguments of counsel for plaintiff in error found at pages 20, 21 and 22 of his brief.

The trouble with this argument is that counsel is dealing with

abstract propositions, so qualified, that they do not apply to the case at bar. His first statement is:

> "The question as to what property a man shall possess provided that its use affects only himself, should be decided by the individual concerned. This is a principle quite generally accepted by thoughtful men."

This statement is true when the use of property affects only him who possesses it, but the excessive use of intoxicating liquor affects others than him who uses it.

In the language of Mr. Justic Greer, "misery, pauperism, and crime" have their origin in the use or abuse of ardent spirits. And even counsel for plaintiff in error will not argue that the State, under its "police power," may not legislate to alleviate misery, diminish pauperism and prevent crime in the greatest possible degree. And to do this, may prohibit that, the use of which produces "misery, pauperism, and crime."

He further says:

> "The power to distinguish between good and evil can be developed only when the individual is confronted with the necessity of making such a distinction; and, likewise the power to choose between good and evil, can be developed only when the individual is required to make a choice.

This statement in the abstract is not objectionable. The number of times we do a thing certainly develops our ability to do it. But it is not a power to distinguish or choose between good and evil, that the State is undertaking to develop by this legislation. This law is intended to place a restriction upon the conduct of the individual who, regardless of his power to distinguish between good and evil, chooses an evil course that brings "misery, pauperism, and crime" upon society. And because of

the result of the action of such as these and the action of those unable to choose the good, the State has said, by this law, that it would remove the conditions that necessitate a choice. So that the only course to follow will result in good.

However, it is not true that the power to choose between good and evil can be developed *only* when the individual is required to make a choice. If this were so, it would be necessary to enable the individual to choose between the non-use or excessive use, of ardent spirits, that he first become drunk or experience the "misery, pauperism, and crime" that have their origin in the use or abuse of ardent spirits.

He further says:

> "If the right to possess alcoholic beverages even for moderate and innocent use be denied, then as far as that subject is concerned, all opportunity for the exercise of the intellect in determining what is good, and what is evil, and all opportunity for exercising the will in choosing the good in preference to the evil is completely eliminated. The elimination of the opportunity for the individual to exercise his own judgment and his own will in such a matter, and his compulsory submission to an inquisitorial and arbitrary statute, not only fails to develop those powers, but it does more, it destroys them."

As an argument this is a mere platitude. We do not ask the little child to put its hand upon the stove to teach it that the stove is hot and will burn. No more should we say to the individual, use ardent spirits until you are drunk, and then determine whether or not you will continue or abstain from their use in the future.

Further he says:

"In our country where the direction of society is ultimately in the hands of the mass of the people, the decay of the power of self-direction is especially dangerous. And that the provisions of the law in question in this case contribute to such decay there seems to be no reasonable doubt. Those provisions have too distorted an idea of wrong-doing. They have too timorous a trust of the individual. The power to know the good and the power to choose it can be developed only in the presence of freedom of choice."

Another platitude. Why do we not leave people to choose between the good and evil of larceny rather than undertake to prevent larceny by making it a crime? Why should we leave to the individual an opportunity to choose bewteen the non-use or the excessive use of intoxicating liquor, when so many, left to do this for themselves, choose that use in which "misery, pauperism, and crime" originate?

Have not the sovereign people both the moral and legal right to determine and say whether or not they will relieve the individual of the necessity for choosing, or take away the opportunity of choosing between the good and evil of the non-use and the excessive use of intoxicating liquor, to the end that the "misery, pauperism, and crime" that have their origin in the use or abuse of ardent spiritis, may be prevented or even materially decreased? Although the plaintiff in error, Ed Crane, is thereby precluded from satisfying his appetite for intoxicating liquor, and must of necessity develop his *self*-reliance by exercising his power of *self*-control and *self*-direction in making choices between the good and evil of other conditions that he meets with along life's highway.

Why not restrict the action of the individual, by prohibiting

his possession and use of intoxicating liquor, and let him exercise this most necessary "power to choose between good and evil" upon whether or not he will respect and obey, or violate and transgress the law? Why not let the individual develop his power of "*self*-direction" and forestall the "decay of the power of *self*-reliance," by a consideration of the law and a determination to stand for the law and for the betterment of his fellow men, rather than place before him, as a temptation, the use of intoxicating liquor, and say to him, "We know you may become a drunkard; you may bring 'misery' upon yourself, your father and mother, your wife and your child; you may become a pauper, your wife and child begging bread; you and yours may become criminals through your use, or misuse, of intoxicating liquor; but we are doing this in order that Ed Crane and a few others may develop the power to distinguish and choose between good and evil,—so that their power of *self*-direction shall not decay."

It is most remarkable to us that the eminent counsel for plaintiff in error can, in the face of all the legislation throughout the country intended and tending to abolish the use of intoxicating liquor, and the modern tendency of the Courts in construing such legislation, so criticise the Act under consideration, and in the same breath uphold Lex Orchia and Lex Fannia, because Lelius, by the number of his guests and the number of courses at his dinners, "was directly reaching the public."

The sumptuary laws of ancient Rome were passed to prevent extravagance in nearly every phase of Roman life. As early as 450 B. C. it was ordained that no woman should appear in the streets attended by more than one maid-servant, unless she were drunk.

The censors, to whom was intrusted the superintendence of public and private morality, punished with the *notatio censoria* all persons guilty of luxurious living, but the love of luxury grew with the increase of wealth and foreign conquests, until the extravagances of the politicians at last became inimical to the public welfare in that all offices became filled with licentious, bankrupt, unscrupulous men.

When a prominent politician carried his indebtedness beyond a certain stage, his very liabilities might redound to his advantage. His creditors, the money powers of the time, dreading that if he failed in his political program he could never repay them, worked heart and soul for his political success.

The amount of money spent on a consuler canvass was enormous. The rate of interest on one occasion was raised from four to eight per cent because there were so many candidates for this high office. This expenditure was made for the purpose of providing feasts and games to entertain the populace.

Feasting was carried to such an extent that to get a name as a tremendous glutton was a very sure and simple way to notoriety, and never was notoriety more hankered after than by the Roman politician.

Marcus Gabus Apicus was the Gourmand's ideal. He lived in the time of Augustus and made away, in refined gluttony, with a fortune of 100,000,000 sesterces (about $4,000,000, with three times the purchasing power of our money). It may be remarked in passing that when his fortune was gone he committed suicide.

History tells us that Publius Octavius once paid 5,000 ses-

terces (equal to $600 of our money) for a fish weighing five and one-half pounds.

Lucius Veras gave a feast costing 6,000,000 sesterces.

The natural consequences of such conduct of course was enormous debts.

Milo, at his death, owed 70,000,000 sesterces, Curio 60,000,000. Marcus Antonius, at twenty-four, owed 6,000,000 sesterces, and fourteen years later owed 40,000,000. Julius Caesar was always in debt, and consequently well served by his creditors. In 62 B. C. he owed 25,000,000 sesterces.

It was to curtail such extravangances as these, and strike down the power of the political bankrupt, that Lex Orchia and Lex Fannia, of which Lelius complained, were passed in 161 B. C. The first limited the number of guests at a feast, the second, the cost thereof, and the amount of meat to be served, to one hen and *that not fattened for the purpose*

Ed Crane, the plaintiff in error, through counsel, in closing his brief, summarizes "the prohibition proposition."

He advises this Court that he wants to be educated to keep away from liquor; that the better policy would be for the State to educate him, Ed Crane, to "keep away from liquor," rather than "try to keep liquor" away from him, Ed Crane.

Since Lot, drunk with wine, in the privacy of his cave and away from society, disgraced the human race; since Nero in drunken revelry fiddled while Rome burned; since the dissipations of Charles I raised up Cromwell, all pure minded people have been bending every effort, have been taxing every resource that intelligence and ingenuity can command, to teach the world

the evils of intemperance; that it never made a happy wife or mother; never gladdened the heart of a child; never made one of God's creatures wiser or better; that the result of indulgence in intoxicating liquor is the source of nearly every wrong; that it is the progenitor of crime, hatred and violence; that want, misery and woe follow in its train; that it fills the penitentiaries with felons and the insane asylums with imbeciles; that it robs the young man of his vigor and worth, and the maid of her chastity and virtue, and makes home a hell upon earth.

Listen, Ed. Crane: When the constitutional convention met more than a quarter of a century ago to prepare and promulgate the fundamental law of our glorious commonwealth, Idaho, there came knocking upon the door of the assembly hall a little organization, the Women's Christian Temperance Union of the Territory of Idaho. They were asking in the interests of the young manhood and the young womanhood of Idaho, the State to be, that the manufacture and sale of intoxicating liquor as a beverage be forever prohibited within the State. In this they were unsuccessful in part, but were successful to the extent that the great men of the State in that convention assembled did say:

> "The first concern of all *good* government is the *virtue* and *sobriety* of the people and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of *temperance* and *morality*."

Thereafter, at every session of the legislature appeared this same organization, advancing education, asking for laws for the promotion of temperance and morality.

To such an extent, Ed Crane, had this teaching advanced in Idaho that, when this Act of which you now complain, was

before the legislature for its consideration, the Senate took but eight days and the House but six to pass it, fourteen days in all, something marvelous in legislation, and then with but two dissenting votes in both branches of the legislature.

Do you say, Ed Crane, that the people of Idaho are not educated to keep away from liquor?

You say, Ed Crane, "All the evils of liquor are not so great as would be the coddling of people by the State under prohibition." What is the State? It is the people. And are you unwilling to let the people coddle themselves under prohibition?

Again you say, "Everybody should not be denied a thing because that thing is bad for somebody." Do you mean to say that because you want to satisfy your taste and appetite for whiskey that those to whom it brings *want* and *woe* should also be permitted to drink whiskey?

Again you say, "There are evils of sex. Does anyone propose sterilization to cure them?" And you answer, "No!" You are wrong in this, Ed Crane. The matter of sterilization is at this very time being discussed throughout the Union, and in many jurisdictions it is in force under legislative enactment.

You say, "But there is nothing good that has not its bad." What do you mean by this, Ed Crane? Listen to what has been said of water!

> "It is the drink that refreshes and brings no sorrow with it. It is the daily need of every living thing. It ascends from the seas obedient to the summons of the sun and, descending, showers blessings upon the earth. It gives beauty to the fragrant flowers. Its alchemy transmutes base clay into golden grain. It is the canvas upon which the finger of the Infinite traces the radiant rainbow of promise. Je-

hovah looked upon it at creation's dawn and said: 'It is good.'"

Tell us, Ed. Crane, what there is in the use of water that is bad!

Further, you say: "Regulate and restrict liquor as we do drugs." To this we say, "Amen!" Place it under the same ban that we have placed upon opium, in the use of which the individual may pursue happiness in the same manner and to a greater degree than he may in the use of intoxicating liquor.

Again you say: "But prohibit them (the use of intoxicating liquors) absolutely, no! Because we can't do it successfully. Because if we could, we would drive men and women to other and worse evils." What evils do you refer to? What evils are worse than those that follow in liquor's train.—"misery, pauperism, and crime"?

Again you say: "The liquor evil dies because men keep themselves from drinking, not because the State keeps liquor from men." Where, Ed Crane, has the liquor evil ever died without State interference? Where has the liquor evil died without legislative enactment restricting and prohibiting its manufacture and use?

Again you say: "We cannot be legislated either wise or moral." You are wrong again, Ed Crane. The civilized world stands today upon a higher moral plane, endowed with more wisdom than ever before in the history of man, and this is due more to legislation that embodies the wisdom and moral sentiment of the great minds of the human race that have stood out

in advance as beacon lights to the great mass of humanity, in its march of progress.

You are wrong, Ed Crane. You are far, far behind the citizenship of Idaho in its movement forward. Your summarization has for its foundation a sentiment that existed centuries ago, the remnants of a policy that grew up during the dark ages, and reached its height in the reign of King John of England; a policy that gave life to the rule, "Every one for himself, and the devil take the hindmost"; a policy that ceased with us as a principle of government with the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

We most respectfully submit that the judgment of the Supreme Court of Idaho should be affirmed.

FRANK L. MOORE,
Prosecuting Attorney of Latah County,
Idaho, for Defendant in Error.

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No. 53

In the Supreme Court

OF THE

United States

ED CRANE,
Plaintiff in Error,
vs.
J. J. CAMPBELL, Sheriff, Latah County, Idaho,
Defendant in Error.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO.

Brief of Defendant in Error

STATEMENT OF THE CASE.

Plaintiff in error sets forth correctly on page 1 and 2 of his brief three sections of law the validity of which is questioned in this case. On page 3 plaintiff in error sets forth the fourth sub-division of the agreed statement of facts.

In addition to the above, on page 11 of the Record will be found the information upon which Ed. Crane was arrested, a part of which reads as follows:

"Wherefore, I, Frank L. Moore, prosecuting attorney of Latah County, State of Idaho, by this information do accuse the said defendant, Ed. Crane, of a crime against the State of Idaho, to-wit: a misdemeanor, namely, having in his possession intoxicating liquor in a prohibition district of the State of Idaho committed as follows, to-wit: "That in Latah County, State of Idaho, on or about the 16th day of May, A. D. 1915, said defendant, Ed. Crane, then and there being or then and there in a prohibition district of the State of Idaho, to-wit: Latah County, Idaho, wilfully, knowingly and unlawfully have in his possession intoxicating liquor to-wit, whisky, contrary to the form, force and effect of the statutes in such case, made and provided against the peace and dignity of the State of Idaho."

REPLY TO ARGUMENT OF PLAINTIFF IN ERROR.

Since the decision of this court in the case of Clark Distilling Company. vs. Western Maryland, 242 U. S., 37 Sup. Ct. Rep. 180, and the recent decisions overruling the cases upon which plaintiff in error relies, we fail to appreciate the force of the argument set forth in his brief. The substance of the alleged error in this case is that a state does not have the power to enact a law prohibiting the possession of intoxicating liquor.

We respectfully submit that the writ of error should be refused by this court and the decision of the Supreme Court of Idaho sustained for the following reasons:

1. The law in question is a valid enactment under the police power and constitution of the State and the facts constitute a violation of such law.

2. The provisions of the law complained of have a reasonable relation to the end to be attained by the admitted valid laws of Idaho, and are necessary to make effective the enforcement of such laws.

3. The law in question is not a violation of the 14th amendment to the Federal Constitution.

THE LAW IS VALID UNDER THE CONSTITUTION AND POLICE POWER.

The police power in the States is a right of the people which is reserved by them to promote the general welfare and protect the public health and the public morals, or as the court said in Adams Express Company vs. Commonwealth of Kentucky, 238 U. S. 190, "It may be said in a general way that the police power extends to all the great public needs."

There may be a division of opinion as to the extent of this power when applied to acts which are not in themselves harmful, but where applied to any traffic or business which menaces the health and morals of the people, there is entire unanimity of opinion, that such subjects come within the police power.

Justice McLain in License cases, 5 Howard 589, said, "It is a power essential to self preservation and extends in every organized community," or as the court said in the case of in re Raher, 140 U. S. 545. "It cannot be denied that the power of the State to protect the lives, health . . . and the public morals . . . is a power originally and always belonging to the States, not surrendered by them to the Federal Government nor directly restrained by the Constitution of the United States and essentially exclusive."

This Court has said:

"No legislature can bargain away the public health or public morals. The people themselves cannot do it, much less their servants." (Stone v. Mississippi, 101 U. S. 814.) "No corporation or individual can acquire any rights, by contract or otherwise, which the government may not annul and take away, if the exercise of such rights becomes detrimental to the public health or the public morals." (Gas Light Co. vs. La. Light Co., 6 Supt. Ct. Rep. 262.) "This power legitimately exercised, can neither be limited by contract nor bartered

away by legislation." (Holden vs. Hardy, 169 U. S. 366.)

Legislative bodies have found that the best way to protect the health and morals of the people is to prohibit institutions which injure these essentials of civilized government.

Public health and morals are inseparably linked together in the decisions of the courts in defining the police power. If comparisons were permissible it might be properly urged that the preservation of public morals was the more important. A man whose health is broken may still be an intelligent, patriotic and useful citizen, but when his morals are undermined, he is neither safe or is to be helpful to the government in carrying out its fundamental purpose.

The authorities cited supra might be multiplied in proving that the people have this inherent right to protect themselves from any traffic which produces vice, crime and misery, and to safeguard the public health and public morals. The only limitation on this power was pointed out by Justive Fuller in the case of Giozza vs. Tiernan, 148 U. S. 657:

> "The amendment (fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

Even this limitation was further restricted in the recent decisions sustaining the Webb-Kenyon Act, Clark Distilling Co. vs. Western Maryland, 242 U. S., in which Chief Justice White, reading the opinion, said:

> "The fact that regulations of liquor have been upheld in numberless instances which would have been

repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied."

It is manifest, therefore, that a state in the exercise of its police power has practically no limitation upon it so long as the subject matter is clearly within this enlarged power of government.

LIQUOR MENACES HEALTH AND MORALS.

That the liquor traffic is a menace to public health and morals has been settled beyond controversy. Public health departments within the recent years have taken a position on this question that would convince anyone who is interested in the public health.

The public health department of New York city in its bulletin says: "It is no use for us to go on fighting disease and crime if we do not do something to abolish the chief factor in causation. . . . It is believed that diminution of the consumption of alcohol by the community would mean less tuberculosis, less poverty, less dependency, less pressure on our hospitals, asylums and jails."

Other public health departments have given expression to similar truths. It confirms what the courts have already said on this subject.

The U. S. Supreme Court said supra, "The injury, it is true, falls upon him in his health, which the habit undermines in his morals, which it weakens, and in the abasement which it creates, but as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him." 137 U. S. 86. Many State and Federal Supreme Court cases could be cited along this line.

Accident insurance companies, industrial insurance companies and every agency interested in public health have given indisputable evidence that the liquor traffic injures public health and shortens life.

PUBLIC MORALS.

That public morals are injured by liquor is shown by the record of every jail, prison, workhouse, public institution and home for delinquents, or, to put it in the words of the court: "The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor shops than to any other source." 137 U. S. 86.

Or as Justice Harlan said: "We cannot shut out of view the fact within the knowledge of all that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks." 8 Sup. Ct. Rep. 207.

Science has demonstrated that liquor is a habit-forming drug. Those who are not strong enough to overcome its natural effect soon drink immoderately and the evil effects of such use are admitted by all. In order, therefore, that a policy of government may be established whereby the strong may aid the weak, laws are enacted to carry out this humane principle. The patriotically inclined willingly obey such laws and give up what seems to them an innocent pleasure in order to help those who are injured by the use of liquor. It is a proper function of government to enact laws to accomplish this purpose. Those who are not unselfish or patriotic enough to give up the use of liquor in order to help their less fortunate neighbors can be compelled to do so by law for the public good. "Salus populi Suprema Lex" is a good standard in legislation and citizenship. This kind of legislation is but a practical application of it.

PROHIBITING POSSESSION OF LIQUOR OR OTHER COMMODITIES IS NOT A NEW POLICY OF GOVERNMENT.

The State not only has the right to prohibit certain acts, but also the right to prohibit the possession of the instrument for accomplishing those prohibited acts, even though such instruments may be harmless in themselves. This principle was established in the case of Patsone vs. Pennsylvania, 232 Sup. Ct. Rep. page 138.

In this the purpose of the statute was to protect game for food supply. The law was sustained which prevented unnaturalized citizens from shooting such game or having in their possession certain firearms by means of which they might shoot such game.

The Court said in discussing this question:

> "The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is, or reasonably might be, considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific differences that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." Lindsley vs. National Carbonic Gas Co., 220 U. S. 61, 80, 81, 55 L. Ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas., 1912 C. 160. The State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." Central Lumber Co. vs. South Dakota, 226 U. S. 157, 160, 57 L. Ed. 164, 169, 33 Sup. Ct. Rep. 66; Rosenthal vs. New York, 326 U.

S. 260, 270, 57 L. Ed. 212, 216, 33 Sup. Ct. Rep. 27; L'Hote vs. New Orleans, 177 U. S. 587, 44 L. Ed. 899, 20 Sup. Ct. Rep. 788. See further Louisville & N. R. Co. vs. Melton, 218 U. S. 36, 54, L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676. "The question, therefore, narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." Barrett vs. Indians, 229 U. S. 26, 29, 57, L. Ed. 1050, 1052, 33 Sup. Ct. Rep. 692.

"Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the State Legislature was wrong in its facts. It is manifest that the means for accomplishing the purpose of a constitutional amendment must be construed with a great deal of latitude, and the body which is best equipped to determine how far the State should go, is the legislature itself."

Legislatures prohibit the possession of game in certain seasons or for certain periods. Commonwealth vs. Bailey, 13 Allen Mass. 541; People vs. Brooks, 101 Mich. 98; Phelps vs. Racey, 60 N. Y. 10; Smith vs. State, 155 Ind. 611; New York ex rel Silz vs. Hesterberg, 211 U. S. 31. In this case the possession of game during the closed season, including game coming without the State, was prohibited. State of Indiana vs. Lewis, 20 L. R. A. 52. In this case the possession of a grill net or seine, except for use in permitted waters, was prohibited.

Possession of stolen property is prohibited People vs. Armstrong, 114 Cal. 570; State vs. Koplan, 167 Mo. 298.

Possession of counterfeit money or instruments for making counterfeit money prohibited. Reg. vs. Williams, C. & M. 259. The legislature may determine when that which is otherwise proper may cease to be such if kept against the law. Train vs. Boston Infecting Co., 144 Mass. 523. In the Indiana case cited, 20 R. R. A. 52, the court said:

"Statutes making it a criminal offense in certain cases to have counterfeit money or dies or tools for making counterfeit money in one's possession are universally held valid though the material out of which they are constructed may be valuable for other purposes. See also Mugler vs. Kansas, 123 U. S. 623; Kidd vs. Pearson, 126 U. S. 1; Kimmish vs. Vall, 129 U. S. 127. In a matter over which the legislature may exercise police power it has the right to exercise such police power, although in so doing it affects the property rights of citizens."

In Lawton vs. Steele, 119 N. Y. 226, the court said:

"There are numerous examples in recent legislation of the exercise of the legislative power to declare property held or used in violation of a particular statute a public nuisance, although such possession and use before the statute was legal."

In State vs. Snover, 42 L. R. A. 341, "a statute authorizing a fish warden appointed by the Governor to enter on lands and destroy a fish basket constructed in violation of the statute, was held valid."

Section 8 of the recent act of Congress relating to the production, importation, disposal or giving away of opium or cocoa leaves provided:

"That it shall be unlawful for any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act, TO HAVE IN HIS POSSESSION OR UNDER HIS CONTROL ANY OF THE AFORESAID DRUGS; AND SUCH POSSESSION OR CONTROL SHALL BE PRESUMPTIVE EVIDENCE OF A VIOLATION OF THIS SECTION AND ALSO OF A VIOLATION OF THE PROVISIONS OF SECTION 1 OF THIS ACT."

Possession of liquor in certain places prohibited. See 23 Cyc., page 174 (c).

Possession of opium under certain conditions prohibited. Luck vs. Sears, 29 Ore. 421.

Possession of lottery tickets prohibited. In Ford vs. State, 85 Md. 405; 60 Am. St. Rep. 337, it was held that a statute of Maryland making it criminal for a person to have in his possession any ticket, slip, list, or record of prizes drawn in a lottery, or any record of any lottery ticket, or anything in the nature thereof, unless for the purpose of procuring and furnishing evidence of violations of the law, is constitutional, the court saying:

> "In view of the disastrous effect on those dealing with lottery tickets, and upon the community where such business is conducted, there can be no doubt about the right of the legislature to prohibit anyone from having them in his possession if that be reasonably necessary for the suppression of the evil. As the statute made it a crime to have them in possession, the purpose for which the traverser had them is wholly immaterial, and inasmuch as the legislature did not make the crime dependent upon the knowledge of the party as to what the articles were, it was unnecessary to allege in the indictment that the traverser had them in his possession, knowingly, wilfully, or in any other words that would impute knowledge of the fact that they were some of the articles prohibited by the law."

In support of its ruling the court cited various cases:

Ex parte Holcomb, 2nd Dillon C. C. 392. (Possession of miniature photographs of United States treasury notes.)

Bickhaut vs. State, 36 Md. 462; 60 Am. State Rep. 332.

Phelps vs. Racey, 60 N. Y. 12; 19 Am. Rep. 140.

State vs. Randolph, 1 Mo. App. 15.

Roth vs. State, 51 Ohio. St. 209, 46 Am. St. Rep. 566.

Magner vs. People, 93 Ill. 320.

It is clear, therefore, that there is nothing new in this

policy of government to prohibit the possession of intoxicating liquor in a state where it is unlawful to sell, manufacture or dispose of such liquor. In the State of Idaho the law prohibited all the means for securing liquor except alcohol for compounding or preparing medicines and wine for sacramental purposes. The legislation involved in this case is the logical sequence of the policy of government which has been established.

A large number of States, in harmony with the policy established in Idaho, have prohibited the possession of liquor and the courts have sustained these laws. In Alabama the law prohibits the receiving of liquor through interstate commerce beyond a certain amount. The law was upheld in the case of the Southern Express Co. vs. Whittle, 69 So. Rep. 652. The North Carolina law was sustained in the case of Glenn vs. Southern Express Co., 87 S. E. Rep. 136. The South Carolina law was upheld in the case of Atkinson vs. Southern Express Co., 94 S. C. 44. The Idaho law was upheld in the case of ex parte Crane, 151 Pac. Rep. 1006. The West Virginia law, which prohibits the receiving or the possession of liquor from a common carrier, was sustained by this court in the case of Clark Distilling Co. vs. Western Md. R. R. Co., 37 Sup. Ct. Rep. 180.

POWER IN IDAHO UNDER THE CONSTITUTION.

The Constitution of the State of Idaho declares:

> "Art. I, Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same whenever they deem it necessary, and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature."

Also, it is declared:

> "Art. III, Sec. 24. The first concern of all good gov-

ernment is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality."

And further it is declared:

"Art. III, Sec. 3. The word 'property' as herein used shall be defined and classified by law."

WHEREFORE:

1. Whatever privileges or immunities may have previously been allowed to makers, sellers, transporters, or users of alcoholic liquors now by the acts of the legislature of Idaho, confirmed by the constitutional amendment, they have been altered, revoked and repealed *by the people* in whom inheres all political power.

2. The *first concern* of all good government, include, according to the Constitution, the "sobriety of the people and the purity of the home. "The legislature and people of Idaho have enacted that possession of alcoholic liquors, other than as provided in the laws of the State, is menacing to the "sobriety of the people," and that to permit its possession "for personal use" would encourage its presence in and thereby imperil "the purity of the home;" hence, the laws of Idaho are, as the Constitution advises, "wise and well directed efforts for the promotion of temperance and morality."

3. The legislature of Idaho has enacted, within its plenary power and discretion, laws that divest alcoholic liquors of character as "property," except under conditions provided in the law, and which conditions plaintiff in error admits do not apply to him in the case at bar. It is the legislature of Idaho, or the people of Idaho, who are authorized to determine whether any given object is "property" in that State.

THE AGREED STATEMENT OF FACTS CONSTITUTE A VIOLATION OF THE STATE LAW.

By the law of Idaho possession of intoxicating liquor is prohibited except pure alcohol to be used for scientific, mechanical purposes or compounded in preparing medicines, or wine to be used for sacramental purposes, or in other words, any intoxicating liquor other than wine and pure alcohol cannot be possessed within the State. By subdivision 4 and 7, it is clear that the plaintiff in error had a bottle of whisky in his possession. By the laws of that State no one can possess whisky for any purpose. The legislature had clearly in mind that whisky being chiefly used for beverage purposes, that no one should be permitted to possess it. The only reason that alcohol and wine were permitted was to supply what they considered a need for medicinal purposes and sacramental purposes. Inasmuch as the beverage traffic in intoxicating liquor was prohibited, the legislature evidently thought that the best way to enforce that law was to make possession of liquors which are most used for beverage purposes unlawful. In other words, it settles down to the proposition as to whether or not the State had power to prohibit the possession of intoxicating liquor. The court in the West Virginia case settles in effect the controversy on this point by saying, "whether the general authority includes the right to forbid individual use we need not consider, since clearly there would be power as an incident to the right to forbid manufacture and sale to restrict the means by which intoxicants for personal use could be obtained even for such use as permitted." In other words, it is clearly manifest that the State has power to prohibit not only the manufacture and sale of liquor, but the means by which a person secures liquor for his own use. In addition to prohibiting the possession of whisky, beer and similar liquors which are most likely to be used as a beverage, the legislature provided the additional safeguard that if a person wanted to secure wine for sacramental purposes, alcohol for scientific

or mechanical purposes or for preparing medicine, that he must apply and get a permit before such possession is legal. This is a reasonable safeguard in preventing persons from securing liquor presumably for a legitimate purpose and then using it for an illegal purpose. Inasmuch as an individual has no right to have liquor manufactured for him or sold to him for his own use, he cannot complain when the State lays down the condition precedent upon which he may secure alcohol or wine for a permitted purpose. Having no right to get it at all, he should not find fault when he has been given something more than that to which he is entitled.

THE LAW IN QUESTION HAS A REASONABLE RELATION TO THE END SOUGHT BY THE PROHIBITION LEGISLATION OF THE STATE OF IDAHO.

No one denies or questions the authority of the State of Idaho to prohibit the manufacture, sale, or distribution of intoxicating liquor. The Supreme Court of Idaho sustained this legislation as a valid enactment under the police power of the State to protect public health and public morals. The recognized purpose of all of this prohibitory legislation is to discourage and prevent the consumption and use of liquor for beverage purposes. This proposition was sustained in State vs. Maine, 20 L. R. A. 496: "It is common knowledge that makes the use of intoxicating liquor as a beverage that is deemed hurtful and is the mischief sought to be prevented by the legislation." The prohibition of the sale of intoxicating liquor is only a means. The end sought for is the prevention, or at least the diminution, of the drinking of intoxicating liquors by the people of the State. The following cases sustain this same proposition. Lincoln vs. Smith, 272 Vt. 320; Hark vs. State, 159 Ala. 171, where the court said: "The evils to be remedied is the use of intoxicating liquor as a beverage . . . and the object of the law in this particular must not be lost

sight of in its interpretation." See also State vs. Delaye, 68 Sou. 995; Southern Express Co. vs. Whittle, 69 Sou. 652; United States Circuit Court of Appeals, 4 Circuit Federal Report; State of W. Va. vs. Adams Express Co., 219 Federal Report 794. The whole proposition is well stated in the case of State vs. Phillips, 67 Sou. 651: "The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approaching step by step, and when the preponderant and prevailing morality of the United States believes that the public welfare demands the final step the way will be found to accomplish the end."

Keeping in mind the purpose of all this legislation, the provisions of the Idaho law in question are not only a convenient but practically a necessary means for making the prohibition law effective, or, as the Supreme Court of Idaho said, they have a reasonable relation to the end sought by their legislation. This court has repeatedly affirmed the principle laid down in the Purity Extract Company vs. Lynch case, 226 U. S. 192.

> "When a State, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous; it may be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

The Supreme Court of Idaho quoted this case and many others as authority for its conclusion. There is ample authority in the legislative power of Idaho to prohibit not only the possession of whisky, beer, and other intoxicants most used for beverage purposes, but also to prohibit beverages which are non-intoxicating but may be used as a

subterfuge for evading the law. If a State may prohibit the sale and giving away of these innocuous beverages in order that the main purposes of the prohibition law may be carried out, it follows that the State may also prohibit the possession of these beverages. The State of Idaho has not used all of the power which it has. The exercise of the legislative power used comes clearly within the authority of the Purity Extract Company vs. Lynch, supra.

CASES CITED BY PLAINTIFF IN ERROR OVERRULED AND DISTINGUISHED.

The following cases cited in plaintiff's brief were either overruled or distinguished before the brief of plaintiff in error was filed: State vs. Gilman, 33 W. Va. 146. This case has been overruled or disapproved by the Supreme Court of West Virginia and was not considered authority by this court in the recent case, Clark Distilling Co. vs. Western Maryland, supra. The Supreme Court of Appeals of West Virginia on Nov. 19, 1915, in State vs. Sixo, 87 S. E. 267, refused to follow the decision in the Gilman case and quoted with approval the case of the Purity Extract Co. vs. Lynch, 226 U. S. 192.

In the Gilman case, decided Nov. 9, 1889, two questions were considered: (1) Whether the statute prohibiting one from keeping in his possession liquors for another was violative of the Fourteenth Amendment of the Federal Constitution, and (2) whether it was violative of a provision in the then State Constitution, declaring that laws may be passed regulating or prohibiting the sale of intoxicating liquors within the State. The decision on the second ground is without value now, because the constitutional provision has been superseded by the prohibition amendment of West Virginia, effective July 1, 1914. In so far as the decision rested on the Fourteenth Amendment of the Federal Constitution, it cannot now be accepted for several reasons. It is entirely out of harmony with sub-

sequent decisions of the Supreme Court of the United States, and particularly with the case of New York vs. Hesterberg, 211 U. S. 31, and Patsone vs. Penn., 232 U. S. 138. Furthermore, in State vs. Davis, No. 2864, decided November 30, 1915, the Supreme Court of West Virginia said in regard to a statute prohibiting the advertising of liquors:

> "A liquor dealer residing and doing business in another State, who by the agency of the United States mails, sends out this State unsolicited and there circulates or distributes to prospective customers, price-lists, circulars, and order blanks advertising his liquors for sale, and which he proposed to ship into this State to them, and which advertising matter by such agency is actually delivered to a citizen of this State, is guilty of a violation of Section 8, Chap. 15, Acts of the Legislature of 1913, known as the Yost law, and may be indicted and punished as provided by such act. . . .
>
> "To so construe said act by virtue of the Acts of Congress known as the Wilson Act and Webb-Kenyon Act, does not infringe on the commerce clause of Section 8, Article I, of the Federal Constitution.
>
> "Nor does the provision of Section 8 of said act of 1913, so construed and applied, violate the privileges and immunities clause of the Fourteenth Amendment of the Federal Constitution."

The Supreme Court of Mississippi in the case of State vs. Phillips, 67 Sou. Rep. 651, distinguished the Gilman case as follows:

> "In State vs. Gilman, supra, the Supreme Court of West Virginia was passing upon the validity of a statute of that State which denounced as a misdemeanor the keeping in possession of spirituous liquors for another by any person not the owner, who had obtained a license therefor. The decision went off upon the court's interpretation of the State Constitution, which declared 'the laws may be passed regulating or prohib-

iting the sale of intoxicating liquors, the legislature was without power to pass the statute.' The court also held that the statute could not be upheld as coming within the police power of the State. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statutes we are considering, and besides the question before the court was complicated by the Constitution of West Virginia."

Inasmuch as the Gilman case was the principal case depended upon in a recent hearing involving the validity of the Webb-Kenyon Act and the prohibition leigslation of West Virginia, it cannot be properly cited as any authority.

Eidge vs. Bessemer, 164 *Alabama* 599. This case was distinguished in former hearing, but since then it has been destroyed as any authority here by the later decision of the Supreme Court of Alabama in Southern Express Co. vs. Whittle, 69 Sou. Rep. 682, decided June 17, 1915.

In that case the Supreme Court of Alabama held that it was competent for the legislature of Alabama to pass a statute limiting the quantity of liquor that a citizen might receive or possess for personal use, and further that the State had the same right under the police power to totally prohibit receipt and possession or importation of liquor, that it had to prohibit its manufacture.

The court dealt specifically with the Eidge case and explained that it could not be regarded or accepted as a governing authority in the case then in hand, for the several reasons stated, one of which was that the Eidge case dealt with an ordinance of a municipality and not with a statute of the State—the ordinance going beyond and in advance of any State statute then of force.

It is interesting to note also that the Supreme Court of Alabama in the Whittle case disapproved the majority view in the case of State vs. Williams, 146 N. C. 618, and stated that it would not follow the case of West Virginia vs. Gilman, 33 W. Va. 146, since it was opposed to the

doctrine or principle in the Alabama c[illegible] of Williams vs. State, 179 Ala. 50.

State vs. Williams, 146 *North Carolina* 618. The majority opinion in the above case has been declared unsound by the Supreme Court of Alabama in Southern Express Co. vs. Whittle, 69 So. Rep. 652, and by the Supreme Court of Mississippi in Phillips vs. State, 67 So. Rep. 651.

The Supreme Court of North Carolina itself, in the case of Glenn vs. Southern Express Co., decided December 1, 1915, has had occasion to consider the Williams case. After sustaining the North Carolina anti-liquor shipping law, similar in principle to the Alabama anti-shipping law, and preparatory to following the decision of the Alabama court in Whittle's case, Mr. Justice Allen, speaking for the whole court, said that the question as to whether common carriers might not be forbidden to transport intoxicating liquor into prohibition territory was not decided, but expressly reserved, in State vs. Williams, 146 N. C. 618. It was then said in the opinion:

> "The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced for sale, and the bringing in of such liquors as being for personal use when intended for sale has been such a prolific source of evasion of prohibition laws that restrictions upon the right of delivery into the State are necessary to prevent illicit sales."

The court then cited with approval the following from Mugler vs. Kansas, 123 U. S. 623.

> "Nor can it be said that government interferes with or impairs anyone's constitutional right of liberty or property when it determines that the manufacture or sale of intoxicating drinks for general or individual use

as a beverage are or may become hurtful to society, and constitute, therefore, a business in which no one may lwafully engage."

The argument of the appellant against the Idaho law is based upon the false assumption that a citizen has a constitutional right to buy or have liquor shipped to him for his personal use. Unless there is some specific provision in the Constitution of the State that guarantees to its citizens this right, then there is no such right. The following propositions are well settled:

The case of ex parte Wilson, 6 Okla. 6 R. 451, 119 Pacific Rep. 596, is cited by plaintiff in error. The case was decided December 11, 1911, prior to the passage of the Webb-Kenyon Act. There was no authority in the State at that time to prohibit the accused from having in his possession the quantity of liquor shipped to him, from Texas. Insofar as the court held that the statute was offensive to the Fourteenth Amendment and to Section 7 of Article II of the State Constitution, we respectfully submit that the decision was erroneous. The court was guided seemingly in its own opinion by the 164 Ala. 299, 33 W. Va. 136 N. C. 618. All of these cases have been overruled by the same reasoning. The decision in the case of ex parte Wilson should be overruled now since the passage of the Webb-Kenyon Act to the recent decision of the Webb-Kenyon Act sustaining its constitutionality.

STATE vs. McINTYRE, 139 N. C. 599.

The law passed upon by the court made possession of over two gallons of liquor prima facie evidence that the person possessing it is engaged in illegal selling. The crime charged in the case was the possession with the intent to sell. The court held that the facts did not make possession a crime and the court was in doubt whether the State had power to make possession of liquor a crime. The court was doubtless right in the construction placed upon

the law, but as to the violating of such a power this decision is overruled by Glenn vs. Southern Express Co., 87 S. E. Rep. 136.

SULLIVAN vs. ONEIDA, 61 ILL. 242.

This case decided that an ordinance which prohibited the possession of liquor exceeded its power under the charter. This case is no authority for the proposition that a State may not prohibit the possession of intoxicating liquor. The power of the municipality is only such as is granted by the State Legislature.

CORFIELD vs. CORYELL, 4 WASH. C. C. 380.

This was an action for trespass for seizing the vessel. The court held, "the vessel having been lawfully in possession of Keene under a contract of hiring for a month, which had not expired at the time, the alleged trespess was committed, the action cannot be supported. It is manifest, that this case of an inferior State court is no authority for plaintiff in error.

FRENCH vs. CITY OF BIRMINGHAM, 51 SO. REP. 254

This case reversed a lower court decision on the authority of Eidge vs. Bessemer. We have already shown that the case of Eidge vs. Bessemer has been overruled by the Supreme Court of Alabama recently in the case of Southern Express Co. vs. Whittle, 69 So. Rep. 652.

IN RE PARROT, 1 FED. REP. 481.

In this case a State law prohibited a corporation from employing a Chinaman. It was properly held unconstitutional because it clearly violated Articles 5 and 6 of the treaty with China. We know of no treaties with China or any other nation which precludes the right of a State to deal with the liquor traffic.

COMMONWEALTH vs. CAMPBELL, 133 KY. 50.

In this case an ordinance prohibited the possession of liquor for the use of the person possessing it. The court held that the city had no such power, that the legislature could not invade the privacy of the home. These and other cases which have recently been cited to this court are clearly distinguished from the case at bar because of the peculiar wording of the Kentucky Constitution and the construction placed upon it by the Supreme Court of that State. In another part of this brief we have shown that the Idaho Constitution gives unlimited power to destroy every phase of the liquor traffic.

HASKELL vs. HOWARD, 269 ILL. 550.

This case held that a city has no power to prohibit advertisements by ordinance. The city had power to control billboards and under this power attempted to prohibit the display of liquor advertisements. There was no express power given to the city to pass ordinances of this kind, and the court followed the usual rule that inasmuch as the legislature had not granted this power the ordinance was invalid.

BUTCHERS UNION vs. CRESCENT CITY LIVE STOCK CO., 4 SUP. COURT REP. 652.

In this case a corporation was given in monopoly for receiving and slaughtering cattle at a certain place. Later on an ordinance was passed in the interest of the public health which conflicted with the rights of this corporation. The court held, "A legislature in regard to public health and morals cannot by any contract limit the exercise of its police power to the prejudice of the general welfare." The court quoted the case of Stone vs. Mississippi, 101 U. S. 814, which held that a State could not charter a lottery company to the detriment of the moral welfare of the na-

tion. In that opinion they said the legislature cannot bargain away the public health and the public morals. The people themselves cannot do it, much less their public servants. The gist of this decision is:

> "Articles 248 and 258 of the Louisiana Constitution and ordinances of the city do not impair the obligation of a contract made by the legislature that a slaughter house company by which they are given exclusive right of having all stock handled at their landing place and butchered at their slaughter house."

UNAUTHORIZED CONCLUSIONS OF PLAINTIFF IN ERROR. INDIVIDUAL RIGHTS.

On page 16 of brief of plaintiff in error he quotes from John Stuart Mill, "The only part of the conduct of anyone for which he is amenable to society is that which concerns others." This presents no authority for plaintiff's conclusion. The person who uses intoxicating liquors affects not only himself but society of which he is a part. It has been repeatedly held by this court that the government has a right to interfere when an individual engages in a course of conduct which injures himself and thereby injures the community. In the case of Crowley vs. Christensen, 137 U. S. 86, the court says:

"The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens, and in self-abasement, which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him." This decision is a sufficient answer to the proposition stated by plaintiff on page 15: "It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned."

Opposing counsel forgets that society is so constituted that any person who is a part of it who injures himself

to some degree at least injures society or the government of which he is a part. Each person who by his conduct makes himself a non-producer or a menace to the public welfare ceases to be an asset to the government, but a liability instead of lifting his share in carrying out the purpose of government, he places a load and burden upon it. The principle laid down by this court in the case of Holden vs. Hardy, 169 U. S. 363, involving the validity of a statute of Utah, limiting the period of employment of workmen in underground mines, or in the smelting, reduction or refining of oils or metals, to eight hours a day, the statute was held to be a valid exercise of the police power of the State.

Mr. Justice Brown, speaking for the court, said:

> ". . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all of the parts, and when the individual health, safety or welfare is sacrificed, or neglected, the State must suffer."

USE AND ABUSE OF ALCOHOLIC BEVERAGES.

On pages 18 and 19 the plaintiff endeavors to justify his position on the ground that a distinction should be made between the use and the abuse of such articles as alcoholic beverages. This argument might have well been addressed to the General Assembly of Idaho when the law in question was before it for consideration. The legislature of Idaho is the sole judge of the policy to be adopted in dealing with liquor so long as the law does not clearly contravene some provision of the State or Federal Constitution. The excessive use of intoxicating liquors is, of course,

more dangerous than the moderate use of such liquors, but scientific research has demonstrated the fact that even the moderate use of intoxicating liquors makes the user more liable to disease and makes it more difficult to recover from disease when afflicted by it. The American insurance companies, through properly authorized committees, reported in December, 1914, "that the statistics gathered from 2,000,000 lives showed that among the men whose habits were considered satisfactory, but were admitted to be alcoholic users in moderate amounts, the death rate was 15 to 1,000, where the death rate would have been only 10 had alcoholic liquors not been used." Having in mind facts like these the Supreme Court of Kansas, 80 Pac. Rep. 987, at page 989, said: "The commodity in controversy is intoxicating liquors, . . . but the article is one whose moderate use even is taken into count by actuaries of the insurance companies and which bars employment in classes of service involving prudent and careful conduct; an article conceded to be fraught with such contagious peril to society that it occupies a different status before the courts and the legislature from other kinds of business."

PERSONAL LIBERTY.

We are surprised that anyone would offer an argument against legislation of this kind based upon so-called personal liberty. It has been repeatedly held that there is no such thing as absolute personal liberty in civilized society. The only kind of liberty that is recognized in government is civil liberty. It is as different from personal liberty as darkness is from light. Civil liberty guarantees to citizens the blessings of liberty. Personal liberty gives to a community the curses of liberty. Blackstone's definition of personal liberty, as quoted by Justice Harlan in the Civil Rights cases, 3rd Sup. Ct. Rep. 42, is as follows: "Personal liberty consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's own inclination may direct, without restraint, unless by

due course of law." The Ohio Supreme Court, in the case of Palmer vs. Tingle, 55 O. S. 441, defines liberty as follows: "The word 'liberty' as used in the first section of the Bill of Rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

In the case of State vs. Kreutzberg, 114 Wis. 530, the court says: "Absolute freedom in one is necessarily subversive of liberty for those with whom he comes in contact, unless such others be strong enough to resist and curtail his will."

"The police power of the State is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity. It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

In U. S. vs. Hudson, 65 Fed. Rep. 74, Justice Parker says: "All the liberty we know anything about under this government is liberty regulated by law. Everything else is licentiousness, because it gives to each person the right to trample upon the rights of all others."

See Jacobson vs. Massachusetts, 25 Sup. Ct. Rep. 358, 361.

Crowley vs. Christensen, 137 U. S. 86, 89, 11 Sup. Ct. Rep. 13, the U. S. Supreme Court said:

> "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the

same right by others. It is, then, liberty regulated by law."

THE IDAHO COURT'S OPINION.

On page 22 plaintiff in error says: "The Idaho court in the case at bar practically holds that the fiat of the legislature is law." The court reversed the opinion of all the authorities that have been quoted on the point and declares, that "the subject of the police power is not left for judicial determination." The difficulty with this statement is that the authorities quoted have all been overruled, modified or can be clearly distinguished, as we have already pointed out. This is what the Supreme Court of Idaho decided in this case and there is complete authority for such decision on pages 15 and 21:

> "The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whisky, or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited. . . . We have reached the conclusion that this act is not in contravention of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, nor of Sec. 13, Art. 1 of the Constitution of Idaho; that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects and that it is, therefore, a reasonable exercise of the police power of the State."

In referring to the application of prohibition to other commodities on page 22 plaintiff says:

> "Many propagandas are found in the West who maintain that tea and coffee, meat and tobacco are

clearly within the legislative control. If the decision of the Idaho court be correct, then the private possession of these things, too, may be denied to the citizen."

This has been a favorite argument of those opposed to prohibition legislation for many years. This court in the decision recently announced by Justice White made a complete answer to this fallacy. The court said:

"The fact that regulations of liquor have been upheld in numberless instances which have been repugnant to the guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has, as we are aware, been taken as affording the basis for the thought that government might exert an enlarged power as the subjects to which under the constitutional guarantees such enlarged power could not be applied."

When health departments, legislatures and insurance companies reach the conclusion that the eating of meat or the drinking of coffee produces crime and misery, shortens life and menaces public morals, it will be plenty of time then for these guardians of personal liberty to raise their voices against such legislation. Intoxicating liquor is in a class by itself. It is treated by legislatures and courts as no other commodity, or as this court said in the case abovementioned:

"The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may constitutionally extend to the things which it may not be consistent with the guarantees of the Constitution."

In reference to Freund on police power is of no avail to

plaintiff in error. If he had quoted the following section, to-wit, 485, it would have added further light. It says:

> "Under these circumstances it seems impossible to speak of a constitutional right of private consumption. There seems to be no direct judicial authority for declaring private acts exempt from the police power and the universal tolerance with regard to them should be ascribed to policy."

For many years the States did not interfere with the possession of liquor, but the lawlessness of the liquor trade made it necessary to prohibit possession of liquor in order to have the admittedly valid main purpose of the prohibition law enforced.

The last irrelevant assertion of opposing counsel is that:

> "We cannot be legislated either wise or moral." No one is attempting to do this. The State is not trying to make its citizenship moral by law. The prohibition policy is established not to make its citizens good by law but to prevent the government from encouraging in a business which makes its citizens drunken, inefficient and sometimes immoral by law.

THE FEDERAL CONSTITUTION GIVES NO GUARANTY TO A CITIZEN TO RECEIVE AND POSSESS INTOXICATING LIQUOR FOR HIS OWN USE.

Unless there is found in the Constitution of the State some provision guaranteeing to an individual the right to receive or possess liquor for his own use, such right is not guaranteed by the Fourteenth Amendment, or any other provision of the Federal Constitution.

The case of Mugler vs. Kansas, 123 U. S. 623, in which the opinion is written by Justice Harlan, completely an-

swers and refutes all arguments advanced by the plaintiff in this case. At page 662, the court said:

> "And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far, from such a regulation having no relation to the general aim sought to be accomplished, the entire scheme of prohibition of Kansas might fail, if the right of liquors for its own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights or liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use, as a beverage, are or may become hurtful to society and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured in our government by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power upon reasonable grounds, declares to be prejudicial to the general welfare."

In Preston vs. Drew, 33 Maine 558; 54 A. Dec. 639, cited in the majority opinion in Eidge vs. Bessemer, 164 Ala. 594, Shepley, S. J., said:

> "The State by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.
>
> "It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a

great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious, and suited to produce by a greater use serious injury to the comfort, morals and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience of law; to disturb the peace and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the Constitution."

In the North Carolina case of So. Ex. Co. vs. High Point (N. C.), 83 S. E. 254, 255, Chief Justice Clark, in a concurring opinion, said:

"There is nothing in the State or Federal Constitution which prohibits the people of North Carolina, speaking through the legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205, it following that the legislature can equally prohibit the importation of such liquors by any person for his own use; and a fortiori it can forbid a common carrier, to bring in or import such liquors, irrespective of whether it is for the consignee's own use or not."

The Supreme Court of Alabama in case of Southern Express Co. vs. Whittle, 69 Sou. Rep. 652, said:

"The government does not interfere with or impair anyone's constitutional rights of liberty or of property, when it determines that the manufacture or sale of intoxicating drinks, for general or individual use, as a

beverage, are, or may become, hurtful to society. . . . Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. Mugler vs. Kansas, 123 U. S. 623, 662-3. Neither the Fourteenth Amendment, nor any other, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people."

The right of the State to prohibit the sale, manufacture and possession of intoxicating liquor has been upheld by this court as a valid exercise of the State's power over this subject matter.

Mugler vs. Kansas, supra.
Boston Beer Co. vs. Massachusetts, 94 U. S. 25.
Kidd vs. Pearsons, 188 U. S. 1.

Clarke Distilling Co. vs. Western Maryland R. R. Co., 37 Sup. Crt. Rep. 180.

Every question raised by plaintiff in error has been decided repeatedly in principle by this court.

We respectfully submit that it is a little short of an imposition for liquor dealers to insist that the courts consider over and over again these questions already adjudicated.

We cannot conceive how this court can make its reasoning or its conclusions clearer; if it can we respectfully appeal to the court to do so and thus prevent the time of the court from being diverted from other important business.

Both precedent, law and justice are ample authority for refusing the writ of error.

Respectfully submitted,

WAYNE B. WHEELER,
Of Counsel for Defendant in Error.

TABLE OF CASES

Some cases are cited twice.

No. 300.

In the Supreme Court

OF THE

United States

ED CRANE,
Plaintiff in Error,
vs.
J. J. CAMPBELL, Sheriff, Latah County, Idaho,
Defendant in Error.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO.

Brief of Defendant In Error

J. H. FORNEY, and
A. H. OVERSMITH,
Counsel for Plaintiff in Error.

T. A. WALTERS,
Attorney General of Idaho,
Counsel for Defendant in Error.

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STATEMENT OF THE CASE.

While Counsel for plaintiff in error has made a fair statement of the facts in this case, we, for convenience in argument, briefly restate them.

Ed Crane, plaintiff in error, had in his possession a bottle of intoxicating liquor for his personal use at the time of his arrest for a violation of sections 2, 15, and 22

of Chapter 11 of the 1915 Session Laws of Idaho. These sections of the Idaho Prohibitory Law are as follows:

Section 2. "It shall be unlawful for any person, firm, company or corporation, its officers or agents, to sell, manufacture, or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district *or have in his or its possession* or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided; PROVIDED, that so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole, it shall not be unlawful for any person, company or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of the prohibition district; PROVIDED, That nothing in this Act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol."

Section 15: "It shall be unlawful for any person to import, ship, sell, transport, deliver, receive, *or have in his possession any intoxicating liquors, except as in this Act provided.*"

Section 22. "It shall be unlawful for any person, firm, company, corporation or agent *to have in his or its possession any intoxicating liquors of any kind for any use or purpose* except the same shall have been obtained and is so possessed under a permit authorized by this Act."

In his application to the Supreme Court of Idaho for a writ of Habeas Corpus, plaintiff in error contended, among other things, that these sections of the Idaho statute are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to Section 13 of Article I of the Constitution of Idaho.

The Supreme Court of Idaho, in a well-considered decision, unanimously "reached the conclusion that this Act is not in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, nor of Section 13 of Article I of the Constitution of Idaho; that it was passed by the Legislature with a view to the protection of the public health, the public morals, and the public safety; that it has a real and substantial relation to those objects, and that it is, therefore, a reasonable exercise of the police power of the State."

In re Crane, 27 Idaho, p. 687; 151 Pac. 1006.

The plaintiff in error appealed from this decision to the Supreme Court of the United States on the ground that the Idaho Supreme Court had erred in holding that the said Idaho statute is not repugnant to the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

The only question presented for the consideration of this Court is: *Is the Idaho prohibitory statute in contravention of the Fourteenth Amendment to the Constitution of the United States?* In other words, did the legislature of Idaho, in enacting the statute making it unlawful for any person *to have in his possession* any intoxicating liquor without a permit as prescribed by the law, exceed its constitutional power? Are the privileges and immunities of citizens of the United States abridged by this enactment? Has the State of Idaho deprived Plaintiff in Error of his

liberty or property without due process of law, or denied him the equal protection of the laws in the enactment of this statute?

At the very outset, we wish to call attention to a very recent decision of this court in the cases of The James Clark Distilling Company vs. Western Maryland Railway Company and The State of West Virginia, rendered on Jan. 8, 1917 (not yet in the reported decisions), where the identical question raised in this case was decided. Under the authority of that decision, we are convinced that the constitutionality of the Idaho statute prohibiting the possession of intoxicating liquors of any kind for any use or purpose (except wine for sacramental purposes, and pure alcohol for mechanical purposes) is settled. We do not believe the right of a state to pass a statute of this character is any longer an open question.

It is only necessary, therefore, for us to point out that the Idaho statute is identical in substance with the West Virginia statute in the matter of possession. However, before making the comparison of the wording of these two statutes, we will briefly cite and refer to the decisions of this court and recent decisions of state courts logically and irresistably leading to the conclusion that a state, under its police power, may prohibit the possession of intoxicating liquors for personal use as a means for the effective enforcement of the prohibition against the manufacture and sale of such liquors.

EXTENT OF POLICE POWER OF A STATE.

(A) IN GENERAL.

"The power of a state to impose restraints and burdens upon persons and property in the conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimate for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the National Government. The Fourteenth Amendment, in forbidding a state to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon objects which are within the domain of state legislation."

Justice Fuller, in re Rahrer, 140 U. S. 544.

"The police power (of the state) is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safe guards of public interest."

Camfield v. U. S., 167 U. S. 518.

"It may be said, in a general way, that the police power extends to all great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Holmes, J., in Noble's State Bank v. Haskell, 219 U. S. 104.

(B) LEGISLATION INCIDENTAL TO AND MAKING EFFECTIVE PROPER PURPOSE UNDER POLICE POWER.

A state has power to adopt reasonable measures to make effective its legislative objects in promoting the general welfare under its police power. The courts uniformly recognize this principle, the only question being what limitation shall be placed by the courts upon such legislation.

The following decisions show that the Supreme Court of the United States clearly recognizes the right of a state to adopt such measures, having a reasonable relation to a proper end, as it may deem necessary.

Booth v. Illinois, 184 U. S. 426, upholds an Illinois statute prohibiting options to buy or sell grain at future time as an appropriate means of preventing gambling.

Murphy v. California, 225 U. S. 623, upholds an ordinance enacted under California statute, prohibiting keeping of pool tables for hire.

Otis v. Parker, 187 U. S. 606, upholds California Constitutional provision declaring void all contracts for the sale of shares of stock on margin as proper means of preventing stock gambling.

(a) LEGISLATION PROHIBITING POSSESSION OF PROPERTY AS INCIDENTAL TO MAIN PURPOSE.

The Supreme Court of the United States has repeatedly upheld this principle in state statutes prohibiting the *pos-*

session of property as a means to accomplish a valid purpose under the police powers of the states:

Patsone vs. Pennsylvania, 232 U. S. 138, upholds a Pennsylvania statute prohibiting the possession of certain fire arms by aliens as a means of preventing aliens from killing wild game.

Lawton vs. Steele, 152 U. S. 133, upholds a statute prohibiting the possession of fishing nets as a means of protecting the fish.

Silz vs. Hesterberg, 211 U. S. 31, upholds a statute of New York prohibiting the possession of plover and grouse during the closed season as a proper means of enforcing the game laws. Under that statute, a conviction was sustained for having in possession plover and grouse of different variety lawfully brought from another state during the open season there.

(C) LEGISLATION REGULATING OR PROHIBITING MANUFACTURE OR SALE OF INTOXICATING LIQUORS.

Under their police power, the right of the several states to regulate or prohibit the manufacture or sale of intoxicating liquors is fully established by the Supreme Court of the United States, and is no longer an open question.

Bartemeyer v. Iowa, 21 L. Ed. 929.

Boston Beer Co. v. Mass., 97 U. S. 25.

Foster v. Kansas, 112 U. S. 205.

Mugler v. Kansas, 123 U. S. 623.

Kidd v. Pierson, 128 U. S. 1.

Crowley v. Christensen, 137 U. S. 91.

In re Rahrer, 140 U. S. 545.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192 (recognized).

Clark Distilling Co. vs. Western Md. Ry. Co., and State of West Virginia, decided Jan. 8, 1917.

(D) LEGISLATION PROHIBITING NON-INTOXICATING LIQUORS UPHELD.

That the state may, under its police power, prohibit the manufacture and sale of malt liquors, "near beer," hop beverages, whether intoxicating or not, as an aid in the enforcement of the prohibition of the manufacture and sale of intoxicating liquors is well established by decisions of this court and numerous state courts.

Purity Extract & Tonic Co. vs. Lynch, 226 U. S. 192.

State v. O'Connell, 58 Atl. 59; 99 Me. 61.

State v. Jenkins, 64 N. H. 375; 10 Atl. 699.

State v. York, 74 N. H. 125; 65 Atl. 685; 13 Ann. Cas. 116.

Gilbert v. Kauffman, 68 Ohio St. 635, 67 N. E. 1062.

Luther v. State, 83 Neb. 455; 20 L. R. A. (N. S.) 1146; 120 N. W. 125.

Pennell v. State, 141 Wis. 35; 123 N. W. 115.

Fiebelman v. State, 130 Ala. 122; 30 So. 384.

Elder v. State, 162 Ala. 41.

State v. Fargo Bottling Works, 124 N. W. 387 (N. D.).

Justice Hughes, in delivering the opinion of the court in the case of Purity Extract & Tonic Company v. Lynch, supra, well expressed the principle of the decisions in these cases as follows:

> "That the state, in exercise of its police power, may prohibit the sale of intoxicating liquors is undoubted. * * * It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish the purpose within the admitted power of the government."

(E) LEGISLATION PROHIBITING SOLICITING OF ORDERS FOR AND ADVERTISING OF INTOXICATING LIQUORS UPHELD.

The state may, in the exercise of its police power, prohibit the soliciting of orders for intoxicating liquors and the advertising of such liquors as a proper means of enforcing the prohibition of the manufacture and sale of such liquors.

Delamater v. S. D., 205 U. S. 93.

State v. Delaye, 68 So. Rep. 993 (Ala.).

State v. Davis, 87 S. E. 262 (W. Va.).

(F) LEGISLATION PROHIBITING TRANSPORTATION OF INTOXICATING LIQUORS UPHELD.

Under its police power, as a proper means of enforcing statutes prohibiting the manufacture and sale of intoxicating liquors, a state may prohibit the transportation of intoxicating liquors.

Williams v. State, 179 Ala. 51.

Western Ala. Ry. Co. v. Brewing Co., 177 Ala. 149.

Clark Distilling Co. vs. Western Md. Ry. Co. and State of West Virginia, decided Jan. 8. 1917.

(G) LEGISLATION PROHIBITING POSSESSION OF INTOXICATING LIQUORS BY SOCIAL CLUBS UPHELD.

The state may prohibit the possession of intoxicating liquors by social or fraternal clubs, even if kept for the personal use of the members of such organizations.

Wallace v. State, 62 So. Rep. 365 (Ala.).

State v. Phillips, 67 So. Rep. 651 (Miss.).

State v. Topeka Club, 82 Kan. 756; 109 Pac. 183.

(H) LEGISLATION PROHIBITING MANUFACTURE OF INTOXICATING LIQUORS FOR PERSONAL USE UPHELD.

The state, by statute, under its police power, may prohibit any citizen from manufacturing intoxicating liquors for his personal use.

Mugler v. Kansas, 123 U. S. 623.

(I) LEGISLATION PROHIBITING POSSESSION FOR PERSONAL USE VALID.

The state may, under its police power, regulate or prohibit *the receipt and possession, even if for personal use*, of intoxicating liquor as a proper means of enforcing its prohibition of the manufacture and sale of such liquor, and, since the enactment of the Webb-Kenyon Law, the state may prohibit the receipt and possession of liquors from another state.

Clark Distilling Company v. Western Md. Ry. Co. and State of West Virginia, (decided by U. S. Supreme Court on Jan. 8, 1917).

Southern Express Co. vs. Whittle, 69 So. Rep. 652 (Ala.).

Glenn v. Southern Express Co., 87 S. E. 136 (N. C.)

U. S. v. O. W. R. & N. Co., 210 Fed. 378.

Preston v. Drew, 54 Am. Dec. 639 (Me.).

Heyward v. Henderson, 109 Ga. 373; 47 L. R. A. 366.

The last proposition stated is the one which, in our opinion, should control in the decision of the case now before this court.

CONTENTION OF PLAINTIFF IN ERROR CONSIDERED.

Counsel for plaintiff in error in this case, in his carefully prepared and able brief, relies solely upon the so-called "natural rights" doctrine to sustain his contention. This

doctrine is well expressed on page 17 of his brief in a quotation from State v. Williams, 146 N. C. 618; 61 S. E. 61:

> "The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed by the Constitution, and can not be abridged so long as the absolute power of a majority is limited by our Constitution."

This doctrine, it is contended, grows out of the time-honored maxim "sic utere tuo ut alienum non laedes."

In the case of Commonwealth vs. Campbell, 133 Ky. 50, the following quotation appearing at page 15 of the brief of plaintiff in error also aptly expresses this idea:

> "The question of what a man will drink, or eat, or own, provided the rights of others are not invaded is one which addresses itself alone to the will of the citizen. It is not within the competency of the government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he, alone, is concerned, or to prohibit him any liberty, the exercise of which will not directly injure society."

In addition to the cases containing the quotations just referred to, counsel relies upon the following cases to sustain his doctrine and to uphold his contention that state legislation prohibiting the mere possession of intoxicating liquor for one's own use are in violation of the rights of a citizen of the United States guaranteed by the Fourteenth Amendment to the Constitution:

Eidge v. Bessemer, 164 Ala. 599, 51 So. 246.

French v. Birmingham, (Ala.) 51 So. 254.

Sullivan v. Oneida, 61 Ill. 252.
State v. McIntyre, 139 N. C. 599; 52 S. E. 63
State v. Gilman, 33 W. Va. 146.
Ex Parte Wilson, 119 Pac. 596.

This doctrine relied upon by plaintiff in error and supported by decisions of courts in a few states, is clearly modified, limited and construed, in its application to liquor legislation, by the Supreme Court of the United States and by recent decisions of many state courts.

In Mugler v. Kansas, supra, (which holds that a state may prohibit a citizen from manufacturing intoxicating liquor for his own use), the Supreme Court of the United States, referring to this doctrine, uses the following language:

"It is, however, contended, that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter, within her limits, for general use as a beverage, 'no Convention or Legislature has a right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.' The argument made in support of the first branch of this proposition, briefly stated, is that in the implied compact between the state and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty or property, without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that, while, according to the doctrines of the commune, the state may control the tastes, appetites, habits,

dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself. * * *

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the Legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety."

Mr. Justice Dunbar, in the case of Territory of Washington vs. Ah Lim, 9 L. R. A. 395, used this language:

"It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of well defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society. Natural rights and liberties of a subject are relative expressions and have relative or changeable meanings. What would be a right of liberty in one state of society would be an undue license in another. * * * * * Now, all civilized governments make provisions for their unfortunates, and progress in this direction has been wonderful, even since the noted sages like Blackstone lectured upon the inalienable rights of man. Not only is the protection of in-

dividual property becoming more secure, but the vicious are restrained and controlled, and the indigent and unfortunate are maintained at the expense of the government in comfort and decency; and the natural liberties and rights of the subject must yield up something to each one of these burdens which advancing civilization is imposing upon the state. It is not an encroachment upon the time-honored rights of the individual, but it is simply an adjustment of the relative rights and responsibilities incident to the changing condition of society."

COUNSEL'S ARGUMENT ADDRESSED TO LEGISLATIVE POLICY.

The able argument of counsel for plaintiff in error is addressed to the legislative policy of prohibiting the possession for personal use of intoxicating liquors. The same doctrine relied upon by him as a legal argument has been called forth time and again to do service in opposition to every form of regulation and control of the liquor traffic. It was relied upon in opposition to the legislation of the state in all the numerous cases where this court has held that the state could regulate or prohibit the manufacture or sale of intoxicating liquors under its police power. It was relied upon in the case of Mugler v. Kansas, supra, where this court held that the state could prohibit the manufacture of intoxicating liquor for one's own use. It was relied upon in the case of Purity Extract & Tonic Co. v. Lynch, supra, where the court held that the state could regulate and prohibit the sale of malt liquors, whether intoxicating or not, as a proper means of enforcing the prohibition laws of Kansas. It was strongly urged upon

this court in the very recent case of Clark Distilling Company vs. Western Maryland Railway Company and the State of West Virginia, supra, where the court upheld the West Virginia statute prohibiting the receipt and possession of intoxicating liquors even for personal use.

COURTS NOT CONCERNED WITH LEGISLATIVE POLICY.

The Supreme Court of the United States, as well as numerous state courts, has held time and again that it is not concerned with the wisdom or unwisdom of legislative policy.

Silz v. Hesterberg, 211 U. S. 31.

Purity Extract & Tonic Co. vs. Lynch, 226 U. S. 192.

State v. Lewis, 134 Ind. 250.

Williams v. Carmack, 27 Miss. 209.

Justices Hughes, in the case of Purity Extract & Tonic Co. vs. Lynch, in re-affirming this principal, said:

> "With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it can not be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system."

Justice Dunbar, in the case of Ah Lim vs. Territory, supra, well expressed the principal in this language:

"The legislative power 'may be unwisely exercised or abused, yet it is a power entrusted by the Constitution to the legislature, which, while exercised within the scope of the grant, is subject alone to their discretion; with which the judicial tribunals have no right to interfere because, in their judgment, the action of the legislature is contrary to the principles of natural justice.'"

PRINCIPAL CASES MODIFIED AND SUPERSEDED.

The principal cases cited and relied upon by counsel—Eidge v. Bessemer (Ala.), State vs. Williams (N. C.), and State v. Gillman (W. Va.)—have been modified, limited and superseded as authority in their respective jurisdictions.

The decision in the case of Eidge v. Bessemer, 164 Ala. 599, for a time regarded as authority in Alabama, has been limited and superseded by the recent case of Southern Express Company v. Whittle, 69 So. Rep. 652, which squarely upholds the Alabama statutes prohibiting the possession of more than a limited quantity of intoxicating liquors for personal use.

Since the decision in the case of State vs. Gilman, 33 W. Va. 146, the state constitution has been amended and that case has been expressly superseded by the cases of State vs. Sixo, 87 S. E. 267, and State v. Davis, 87 S. E. 262. And the West Virginia statute prohibiting the receipt and possession of intoxicating liquors for personal use has been upheld in the very recent decision of the United States Supreme Court in the case of Clark Distilling Company vs. Western Maryland Railway Company, et al., supra.

State v. Williams, 146 N. C. 618, has been expressly sup-

erseded as authority by the case of Glenn vs. Express Company, 87 S. E. 136, which expressly approved the decision in Southern Express Company vs. Whittle, supra.

The case of Van Winkle vs. State, 91 Atl. 381 (Del.), in considering a statute almost identical with that involved in State v. Williams, supra, upheld the constitutionality of the statute, thus putting Delaware in line with the recent decisions in Alabama, North Carolina, and West Virginia.

In the case of Atkinson vs. Southern Express Company, 94 S. C. 44, although decided before the 1915 statute, prohibiting the possession of more than a limited quantity of intoxicating liquors became effective, the Supreme Court of South Carolina has clearly indicated by dictum that it would uphold such statute.

It is thus seen that the principal cases cited by counsel for plaintiff in error are no longer authority for the proposition contended for by him.

DECISION IN THE CLARK DISTILLING COMPANY CASE CONCLUSIVE.

As stated, in limine, undoubtedly the decision of this court in the Clark Distilling Company case is conclusive of the question before the court in this case. A reference to the wording of the provisions of the Idaho and West Virginia statutes relating to the possession of intoxicating liquors discloses their identity in substance:

WEST VIRGINIA.

Sec. 34, 1915 Law: It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common or other carrier. *It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common or other carrier in this state. This section shall apply to such liquors intended for personal use,* as well as otherwise, and to interstate, as well as to intrastate shipments or carriage. Any person violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose as set forth in sections four and twenty-four.

IDAHO.

Sec. 2, Chap. 11, 1915 Session Laws: *It shall be unlawful for any person,* firm, company or corporation, its officers or agents, *to* sell, manufacture, or dispose of any intoxicating liquor or alcohol within a prohibition district *or have in his* or its *possession* or to transport *any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided.* (Omitted portion not referring to possession).

Sec. 15. *It shall be unlawful for any person to* import, ship, sell, transport, deliver, receive or *have in his possession any intoxicating liquors except as in this Act provided.*

Sec. 22. *It shall be unlawful for any person,* firm, company, corporation, or agent *to have in his* or *its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this*

Act. (Possession of alcohol by pharmacists and of wine by priests for sacramental purposes and of alcohol for mechanical purposes under permit from Probate Court permitted under sections 3 to 13, inclusive, of this Act.)

It must be apparent from even a casual comparison of these statutes that their provisions as to possession are, in substance, identical.

At page 4 of the opinion as delivered by Chief Justice White in the Clark Distilling Company case, in passing upon the constitutionality of the West Virginia statute, the court said:

> "That the government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its taffic, is not open to controversy; *and that there goes along with this power, full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid the manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted.* This being true, there can be no doubt that the West Virginia prohibition law did not offend against the due process clause of the Fourteenth Amendment."

We respectfully submit that the provisions of the Idaho statute relating to the possession of intoxicating liquors are

not repugnant to the Fourteenth Amendment, and that the judgment of the Supreme Court of Idaho should be affirmed.

T. A. WALTERS,

Attorney General of the State of Idaho,

Counsel for Defendant in Error.

Frank Moore
Moscow Idaho
Counsel

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THE case is stated in the opinion.

Mr. J. H. Forney and *Mr. A. H. Oversmith* for plaintiff in error, submitted.

Mr. T. A. Walters, Attorney General of the State of Idaho, with whom *Mr. Frank L. Moore* and *Mr. Wayne B. Wheeler* were on the briefs, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

An Act of the Legislature of Idaho, approved February 18, 1915, "defining prohibition districts and regulating and prohibiting the manufacture, sale . . . transportation for sale or gift, and traffic in intoxicating liquors &c." (Session Laws of Idaho, 1915, c. 11), provides:

"Sec. 2. It shall be unlawful for any person, firm, company or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district or have in his or its possession or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided: Provided, That so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole, it shall not be unlawful for any person, company or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of the prohibition district: Provided, That nothing in this Act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol."

"Sec. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this Act."

Plaintiff in error was arrested and held in custody by the sheriff, in default of bail, solely because charged with having "in his possession a bottle of whiskey for his own use and benefit and not for the purpose of giving away or selling the same to any person" within Latah County, Idaho—a prohibition district—on May 16, 1915, in violation of the quoted sections. He sued out a writ of *habeas corpus* from the State Supreme Court and sought discharge upon the ground that those sections were in contravention of the Fourteenth Amendment, Federal Constitution, and therefore void. The court held: "The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whiskey, or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited." And further, "we have reached the conclusion that this act is not in contravention of Section one of the Fourteenth Amendment to the Constitution of the United States . . . ; that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects and that it is, therefore, a reasonable exercise of the police power of the

State." (*In re Ed. Crane*, 27 Idaho, 671.) The writ was accordingly quashed and the petitioner remanded to custody.

The question presented for our determination is whether the Idaho statute, in so far as it undertakes to render criminal the mere possession of whiskey for personal use, conflicts with that portion of the Fourteenth Amendment which declares "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law." Its validity under the state constitution is not open for our consideration; with its wisdom this court is not directly concerned.

It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Company* v. *Massachusetts*, 97 U. S. 25, 33; *Mugler* v. *Kansas*, 123 U. S. 623, 662; *Crowley* v. *Christensen*, 137 U. S. 86, 91; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320, 321; *Seaboard Air Line Ry.* v. *North Carolina*, *ante*, 298.

As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. *Booth* v. *Illinois*, 184 U. S. 425; *Silz* v. *Hesterberg*, 211 U. S. 31; *Murphy* v. *California*, 225 U. S. 623; and *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 364. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary

and unreasonable or without proper relation to the legitimate legislative purpose.

We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State.

The judgment of the court below must be

Affirmed.

CRANE *v.* CAMPBELL, SHERIFF OF LATAH COUNTY, IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 53. Argued November 15, 1917.—Decided December 10, 1917.

A State may prohibit and punish the possession of intoxicating liquor for personal use. Idaho Laws, 1915, c. 11, p. 41, sustained.
27 Idaho, 671, affirmed.